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CONNECTICUT REPORTS:

BEING REPORTS OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ERRORS
OF THE
STATE OF CONNECTICUT.

VOL. L.

BY JOHN HOOKER.

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Rec. June 23, 1884

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JUDGES
OF THE
SUPREME COURT OF ERRORS
DURING THE TIME OF THE WITHIN DECISIONS.

HON. JOHN DUANE PARK, CHIEF JUSTICE.
HON. ELISHA CARPENTER.
HON. DWIGHT WHITEFIELD PARDEE.
HON. DWIGHT LOOMIS.
HON. MILES TOBEY GRANGER.

**The Statute Book referred to in this volume as the Revised
Statutes or General Statutes, is the Revision of 1875.**

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SUPREME COURT OF ERRORS
OF THE
STATE OF CONNECTICUT.

HELD AT BRIDGEPORT FOR THE COUNTY OF
FAIRFIELD.

ON THE THIRD TUESDAY OF MARCH, 1882.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, JS.

BARNABAS ALLEN AND OTHERS *vs.* SAMUEL H. RUNDLE
AND OTHERS.

A guaranty that a note is collectible is a conditional one, the condition being that diligence should be used in collecting it.

Some courts of high authority in this country have held that the only evidence that the note is not collectible is the failure of legal proceedings, diligently pursued, to result in collection. Other courts of equal authority have held differently. It seems more in accordance with the general principles adopted by this court in cases of guaranty, and more just, not to require a suit, with all its attendant expense and trouble, where it must be fruitless, and to allow under some circumstances the diligence to be waived by the party for whose benefit it is required.

But where the exact diligence required is expressly stated in the contract, the want of it will not be excused.

In a suit upon a guaranty of the collectibility of a note the burden of proof is on the plaintiff to show, either that he has exhausted all legal remedies, or that the maker was insolvent, or that the guarantor had waived the legal proceedings.

B executed to the plaintiffs his note on demand, on the back of which the defendants signed the following guaranty:—"For value received, we

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jointly and severally guarantee the within note good and collectible until paid." In a suit brought on the guaranty several years later, and without having brought suit against the maker, whom the plaintiffs claimed to have been insolvent, the plaintiffs offered evidence that it was understood between the maker, the guarantors and themselves at the time the note was made, that the maker had signed it without consideration, at the request and for the accommodation of the guarantors, and upon their promise that they would take care of it and pay it within a short time. Held that this evidence was inadmissible as going to establish at the very making of the note an oral agreement in direct conflict with the written guaranty.

And held that it was not admissible for the purpose of establishing a waiver by the guarantors of the institution of proceedings against the maker for the collection of the note, as it would produce the same effect with a material change of the written contract.

Nor admissible to estop the guarantors. Promissory representations as to future action dependent upon a contract to be entered into, do not create an estoppel.

Under our statute with regard to fraudulent conveyances (Gen. Statutes, p. 345,) it is not necessary to prove a specific design to defraud the particular creditor who assails the conveyance; the intent to defraud one creditor renders the conveyance void as to all.

The language of the statute differs somewhat from that of 13 Eliz., c. 5, but it is essentially copied from it and must receive a similar construction. Where there are no facts in evidence on which a request for a charge is based, the judge is not bound to give any instruction to the jury upon it. The omission to charge in writing upon written requests, as required by statute (Gen. Statutes, p. 442, sec. 2,) would be ground for granting a new trial, unless waived by the party making the request or occasioning no injury.

ASSUMPSIT on a guaranty; brought to the Superior Court, and tried to the jury before *Hitchcock, J.*

Upon the trial the plaintiffs offered in evidence the following note and guaranty, the execution of which was admitted:

" 7,000.

DANBURY, Nov. 25th, 1871.

"On demand, I promise to pay to Barnabas Allen and William F. Taylor, seven thousand dollars, with interest semi-annually, and the taxes that may accrue on the same, for value received.

CHARLES BENEDICT."

The guaranty was written on the back of the note and was signed by all the defendants.

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"For value received we jointly and severally guarantee the within note good and collectible until paid.

S. H. RUNDLE.
WM. P. SEELEY.
ANDREW HULL.
ISAAC W. IVES.
CHARLES HULL.
GEORGE C. WHITE.
W. F. LACEY."

The defendants claimed in defence that the plaintiffs had not used due diligence to collect the note of Benedict, the maker, and that therefore no suit could be maintained by them against the defendants as guarantors. In answer to this claim the plaintiffs claimed that their failure to commence suit against the maker was legally excused:—first, because at the commencement of the present suit the maker of the note was utterly insolvent, and second, because it was understood between the maker, guarantors and payees of the note at the time of its execution and delivery, that the maker had signed it without consideration, at the request of and for the accommodation of the guarantors, and upon their promise that they would take care of it and pay it within a short time from its date.

Under the second claim the plaintiffs offered evidence in chief, to prove that in the year 1871 the Bartram & Fanton Sewing Machine Company was indebted to them in the sum of \$7,000, and was being pressed for payment; that William P. Seeley, one of the defendants, and who was acting and managing for said company, of which he was a stockholder, in paying off its debts, proposed to the plaintiffs, that as the company would want to use what ready money it had, it would get up a note and get some one to sign it, whom the stockholders, or some of them, would indemnify, and would sign as guarantors on the back of the note, and that they thought they could get Charles Benedict to let them use his name. That thereafter Charles Hull, one of the defendants, and also a stockholder in the com-

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pany, went to Benedict for the purpose of inducing him to lend his name as maker of the proposed note, and for that purpose promised him that he should never be called upon to pay it and that no harm should ever come to him from signing it, but that the guarantors would pay it. That afterwards Hull and Seeley gave the note in question to the plaintiffs in accordance with their proposition, and they and the other guarantors, all of whom were stockholders in the company, told the plaintiffs that they had got from Benedict his name, and had agreed to protect him and to pay the note, and that no harm should come to him from signing it; and that the plaintiffs accepted the note in payment of their debt against the company. That afterwards Benedict also informed the plaintiffs that the defendants had promised to protect him, and that it was agreed when he signed it that he was not to pay it, and should have no trouble with it; but that the parties who signed on the back of it should take care of it. Also that the defendants repeatedly after the execution of the note, and before the commencement of this suit, upon being pressed for payment, agreed to pay the same, and acknowledged the promise made to Benedict, that he should not be called upon to pay it, and themselves paid the plaintiffs six months' interest on the note, which was all the interest that had been paid thereon.

To the testimony of the promise made by Hull to Benedict at the time of the execution of the note, the defendants objected, on the ground that it could not be admitted to vary or contradict the written terms of the note and guaranty, and that it was a conversation *inter alios*. And a like objection was specifically made to all the rest of the testimony. The plaintiffs claimed the admission of the testimony solely as bearing upon the question of their claimed failure to use due diligence in endeavoring to collect the note from the maker, before having recourse to the defendants, and the court admitted it for that purpose only, and ruled that it was inadmissible for the purpose of varying or contradicting the note and guaranty.

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Under the plaintiffs' first claim, they offered evidence to prove, and claimed to have proved, that at the maturity of the note and ever since, Benedict, the maker, was and had been utterly insolvent and without property from which it could be collected. This the defendants denied, and offered evidence to prove that, at the time he signed the note, he was of abundant pecuniary ability to pay it; that from that time continuously until April 28th, 1873, more than \$30,000 worth of property in Danbury stood in his name and belonged to him; that on that day he transferred all his property to his wife, who still held possession of more than \$25,000 worth of the same; that the only consideration for the transfer was the purchase by Mrs. Benedict, in 1868, of certain debts, amounting to \$23,000, in favor of certain creditors against her husband, for fifteen per cent. of their face value, and a debt of \$4,500, due from Benedict to Mrs. Benedict's father, and which had been set out to Mrs. Benedict upon the distribution of her father's estate; that Mr. and Mrs. Benedict were married in 1828, and that the money with which she purchased the debts was the proceeds of property given to her by her husband at a time when he was not indebted; that the transfer was made because one Burr had three days previously brought a suit against Benedict for the claimed illegal use of a patent right, and that the plaintiff Taylor drew, witnessed and took the acknowledgment of the transfer.

It was conceded that the plaintiffs had been the holders of the note from the time it was made, and that Taylor had advised Benedict not to pay it as it would be unfair and unjust.

On the contrary the plaintiffs offered evidence to prove, and claimed they had proved, that in 1863 Benedict owed to different parties notes amounting then to \$23,000, which he was pressed to pay, but was then unable to pay; that his wife, with her own sole and separate funds, purchased the notes, which were thereupon legally assigned to her individually, and all of which Mr. Benedict then and often thereafter repeatedly promised her to pay to her in full with

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interest thereon, but never had paid; that the conveyance of April 28th, 1873, was made in good faith for the purpose of paying this indebtedness to his wife, without intent to avoid any debt or duty, but was made at that particular time because one Burr had a few days before brought to the District Court of the United States a petition for an injunction against Benedict's using a certain patent right, claimed by Burr to belong to him, with a prayer for an accounting and a claim for damages for an infringement of the patent right. That Benedict had always denied the patent right to be valid, and that he had ever infringed the same, and had from the first defended and was still defending against the suit, but that it had never been brought to or pressed for trial, and had for years lain dormant on the docket of the court. That at the time of his deed to his wife, he both claimed and believed, and ever since had claimed and believed, and contended, that he never was liable to said Burr, or indebted to any one except his wife. That Taylor acted simply as the scrivener in drawing the deed, and neither advised the giving of it, nor was consulted in respect to the Burr suit, but only as to the proper form of the transfer; and that the real estate conveyed by the deed did not exceed in value the amount due upon the claims so purchased by and transferred to the wife.

The defendants also claimed that Benedict was indemnified by a bond, for any loss that might fall upon him if he paid the note in suit; that all the defendants and fourteen other persons were obligors upon the bond, and that all promises and statements made by them or either of them concerning the payment of the note, were made by them as obligors upon the bond, and were so understood by all the parties. The plaintiffs denied that the bond was given to indemnify Benedict for loss upon the note, or was any protection to him if he paid it, or that the promises made by the defendants were based upon their relation as signers of the bond.

Upon the evidence in the case the defendants claimed and asked the court to charge the jury, that if they found

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the facts concerning the transfer from Benedict to his wife, in April, 1873, as claimed by them, such transfer was void as to the plaintiffs, and that the plaintiffs could still collect the note in suit out of said property, and that it was their duty so to do; and that if this was not so, the plaintiffs had by their own fraudulent co-operation with Benedict in the transfer, rendered him insolvent, and therefore could not recover of the defendants.

The court refused so to charge, but instructed the jury as follows:

“It is a question of fact for you to decide, whether or not Benedict was insolvent when this suit was brought. The defendants claim he was not insolvent, because the transfer of April 28th, 1873, was fraudulent and void. If you find the transfer was made to defraud Burr, it would be void as to that claim, but our statute prevents it from being void as to any one except him whose debt was sought to be avoided. It is claimed that the transfer is void for inadequacy of price, as to creditors. I do not understand that any creditors are here asking to be heard. I think that the transfer should be treated, so far as this suit goes, as a valid transfer.

“But the plaintiffs claim that, whether or not the transfer was void, there has been a waiver of diligence by the defendants. I am inclined to think that if we consider merely the contract on the note and back, it was the duty of the plaintiffs to sue Benedict, if he had property. But the plaintiffs claim that this defence of failure to sue Benedict has all been waived; that the defendants had no right to expect the plaintiffs to look to Benedict; that at the inception of the note promises were made to Benedict, and to the plaintiffs when they took the note, that Benedict need not pay it. If you believe such promises were made, it does not make the defendants liable as principals, but they waive thereby their right to require of the plaintiffs that they should sue Benedict, because the plaintiffs had a right to rely upon these promises, even if they knew Benedict had property. If these promises were made, then the

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plaintiffs were not bound to sue Benedict; if not made, then the defendants could require the plaintiffs to bring a suit against Benedict, if he had property, or if his property was conveyed away by the fault of the defendants."

Before the opening of the argument the defendants filed with the clerk and presented to the judge the following (among other) written requests to charge:—

4. "If the jury find that the conveyance of April 28th, 1873, from Benedict to his wife, was made with intent to avoid the Burr claim, then in a suit against him such conveyance was void, and the property so conveyed could be attached by the plaintiffs, then his creditors, and taken upon execution as his own estate, notwithstanding the consideration paid therefor by his wife."

6. "When the intent is ascertained in respect to a conveyance, the law pronounces whether it is fraudulent or not. It being admitted by Mr. and Mrs. Benedict, and entirely undisputed, that the conveyance of April 28th, 1873, was made in part on account of the pendency of the Burr suit, which had been commenced three days before, and in fear of and to avoid the possible consequences of that suit, such intent was in law fraudulent."

7. "The voluntary payment by Mrs. Benedict in 1863 of her husband's debts, did not create the relation of debtor and creditor between them, and was, in respect to his creditors existing in 1873, no consideration for the conveyance at that time."

8. "The payment by Mrs. Benedict in 1863 for the benefit of her husband, would not, as against his creditors in 1873, entitle her to then make a claim legal or equitable against him or his property for anything beyond the actual consideration by her paid. At most she could have only an equitable claim for the amount actually paid."

9. "If the jury find the consideration of the conveyance from Benedict to his wife in 1873 was grossly inadequate, she acquired as against his then existing creditors only such an interest in the property as would be a fair equivalent for the actual consideration. In such case the remaining

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interest in the property could be appropriated by his then existing creditors."

10. "If the jury find that the plaintiffs, without the knowledge of the defendants or either of them, assisted Benedict to convey away all his property to his wife for an inadequate and antecedent consideration, and with the intent to avoid the result of the Burr suit then pending, and took no steps to avail themselves of Benedict's property, and advised him not to pay the note in suit, they cannot recover."

13. "If a holder of a note has lost his remedy against the guarantor by neglect or laches, a subsequent promise on the part of the guarantor to pay will not revive the obligation."

The judge did not charge in writing, but only orally, upon these requests, and instructed the jury as follows upon them respectively.

In relation to the fourth request: "If it was void, any creditor could pursue it. If void, it did not pass the title out of Benedict, except as it is governed by our statute."

In relation to the sixth request: "The first paragraph is true as a proposition of law. These fraudulent conveyances to avoid a particular claim are by our statute limited to such persons and claims."

In relation to the seventh request: "By the statute of 1863 the husband was entitled to the rents and profits of his wife's real estate and the use of her personal property. It is for you to say if there are any facts that bring that within this case. As against creditors it would be void. It is for you to inquire if any creditors complain. It is void as to the Burr claim, if that is ever put into judgment. Who is there here to complain?"

In relation to the eighth request: "That is correct, as against creditors. The question is, where are they and who are they?"

In relation to the ninth request: "It is a correct proposition of law. Property can not be conveyed in large amounts for a pepper-corn. The question is, where are the

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creditors? It is not enough to speak of them on paper. Where are they in court that do complain or can complain?"

In relation to the tenth request: "It is a correct legal proposition. If Benedict, when the note fell due, had property, they should have pursued his property. All that refers to the Burr suit; as I have said, our statute confines the invalidity to the person sought to be defrauded, to wit, to the holders of the Burr claim."

In relation to the thirteenth request: "If you think the defendants knew they were not liable, and promised to pay, that renews the obligation."

The defendants did not request the court to charge in writing, and no exception to such omission was taken at the time, nor until the filing of the present motion. The judge read the requests to charge to the jury, and charged upon each one orally as he read them.

The jury having returned a verdict for the plaintiffs, the defendants moved for a new trial for errors in the charge of the court and in the omission to charge as requested.

L. D. Brewster and S. Tweedy, in support of the motion, contended that it was the duty of the plaintiffs, if they would hold the defendants on their guaranty, to have brought suit against Benedict, or to show his utter insolvency, or to prove a waiver of such proceedings by the defendants; that the court erred in charging the jury that a conveyance of his property by Benedict to defraud a particular creditor was void only against that creditor; that such a conveyance being void against all creditors, and therefore against the plaintiffs, the latter could have attached the property and thus have secured payment of the note; that the evidence of the parol agreement of the guarantors to pay the debt themselves, without any proceedings against Benedict, made at the time the note was made, was inadmissible as varying the written guaranty, of which the condition that diligence should be used in collecting the note of the maker was a vital part; that it

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could not be admitted to prove a waiver of such proceedings as it would be equally in conflict with the written contract; and that the omission of the judge to charge in writing upon the points presented in the written requests of the defendants, such written charge being required by statute, was a ground for granting a new trial.

H. S. Sanford and *E. W. Seymour*, with whom was *W. F. Taylor*, contra, contended that it was not necessary to proceed against the maker of the note by reason of his insolvency; that if he was not insolvent, such proceeding had been waived by the defendants, who were the actual debtors, they having agreed that the note should not be collected of the maker but that they would pay it themselves; that their agreement to this effect, though it might not be admissible to vary the written contract, was yet admissible to prove a waiver; that it did not affect the case that it was made at the same time with the note, as it is a well established rule that an endorser may, at the time of his endorsement, make a parol waiver of demand and notice; that this agreement could operate as an estoppel on the defendants, if in no other way; that the charge of the judge with regard to the effect of a fraudulent conveyance upon other creditors was in accordance with the language of our statute as to fraudulent conveyances; that if the judge was wrong in this or any other of his rulings the court could see clearly that justice had been done by the verdict, and that where this was the case a new trial would not be granted.

LOOMIS, J. On the 25th day of November, 1871, Charles Benedict gave his note to the plaintiffs for the sum of seven thousand dollars, payable on demand, with interest semi-annually and taxes. On the back of this note was the following written guaranty, signed by each of the defendants:—"For value received, we jointly and severally guarantee the within note good and collectible until paid."

Although the declaration has a wider sweep, yet it is con-

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ceded that the plaintiffs must recover, if at all, upon the contract of guaranty alone. All other grounds of action are excluded by the decision of this court when this case was previously before it. *Allen v. Rundle*, 45 Conn., 528.

Guaranties are either absolute or conditional. If *A* guarantees the collectibility or goodness of *B*'s note to *C*, he does not absolutely guarantee its payment, but only that he will pay it in the event that *C* shall test the collectibility or goodness of the note by regular prosecution of suit against *B*, and shall be unable by due and reasonable diligence to enforce its payment. 2 Daniels on Negotiable Instruments, § 1769. In Edwards on Bills (2d Ed., side p. 238,) the doctrine is more fully stated as follows:—"A guaranty that a note is collectible is a conditional promise binding upon the guarantor only in case of diligence. In order to perfect the obligation so as to render him liable thereon, the guaranteee must use diligence in the endeavor to collect his note, for it is a condition precedent. In other words, the obligation, which is inchoate, does not become absolute until the guaranteee has performed the condition on his part; and it seems that if he fails to perform the condition precedent, so that in fact no obligation accrues and becomes perfect against the guarantor, even a subsequent and express promise to pay will not render him liable thereon."

In fixing liability on such a guaranty courts of high authority, notably those of the state of New York, hold that the only evidence that the note is not collectible is the failure of legal proceedings, diligently pursued, to result in collection. *Moakley v. Riggs*, 19 Johns., 69; *Thomas v. Woods*, 4 Cow., 173; *Taylor v. Bullen*, 6 Cow., 624; *Cumpston v. McNair*, 1 Wend., 457; *White v. Case*, 18 Wend., 543; *Loveland v. Shepard*, 2 Hill, 139; *Vanderveer v. Wright*, 6 Barb., 547; *Newell v. Fowler*, 23 Barb., 92; *Gallagher v. White*, 31 Barb., 92; *Mosier v. Waful*, 56 Barb., 80; *Craig v. Parkis*, 40 N. York, 181.

And the same rule has been adopted by the courts of Wisconsin, Michigan and several other states. *Borden v. Gilbert*,

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13 Wis., 670; *Bosman v. Akeley*, 39 Mich., 710. In the latter case COOLEY, J., giving the opinion of the court, after an able review of the authorities in the several states, referring to the New York doctrine, says:—"We believe that rule to be reasonable and to accord with the general understanding of the parties when such guaranties are given. The undertaking that a note is collectible, means that if legal proceedings for collection are diligently prosecuted at law they shall result in collection. It does not mean that the maker of the note is responsible or shall remain responsible, but that the debt shall be collected if the proper steps are promptly taken for the purpose. It may be that an officer would find attachable property where the witnesses knew of none; it may be that, with the large exemptions allowed by law, the debtor would choose to make payment rather than have the judgment stand against him, even when payment could not be enforced."

On the other hand, the courts of Ohio, Pennsylvania, Massachusetts, Maine and Vermont, while construing such a guaranty in substantially the same manner, yet hold that it is not necessary to institute a suit if the maker is insolvent, and they allow proof of the waiver of the condition by the guarantor. *Stone v. Rockefeller*, 29 Ohio St., 625; *McDoal v. Yeomans*, 8 Watts, 861; *McClurg v. Foyer*, 15 Penn. St., 298; *Miles v. Linnell*, 97 Mass., 298; *Gilligan v. Boardman*, 29 Maine, 79; *Wheeler v. Lewis*, 11 Verm., 265; *Bull v. Bliss*, 30 Verm., 127; *Dana v. Conant*, id., 246.

It is difficult to determine on which side is the weight of legal authority. The question in this state may perhaps be regarded as an open one. The only importance it has for the purposes of the present case is its bearing upon the question of evidence and upon the duty of the court relative to the thirteenth written request. If we adopt the New York rule, it would logically require all evidence of waiver to be rejected and a subsequent promise by the defendants would not relieve the plaintiffs from the consequences of their laches. We are not prepared to accept this rule, notwithstanding the force of logic and weight of

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legal authority by which it is supported. The principles adopted by this court in the cases of *Perkins v. Catlin*, 11 Conn., 213, and *Ransom v. Sherwood*, 26 Conn., 437, and the fact that it seems more just and equitable not to require a suit, with all its attendant expenses and trouble, where suit must be vain, incline us so to hold, and to allow under some circumstances the diligence required by the law to be waived by the party for whose benefit it is required. Regard however must always be had to the terms of the contract of guaranty. Where it is so explicit as to leave no room for construction, that is, where the exact diligence required is all stipulated in the contract—in such case, though vain, the steps pointed out must all be taken, for the reason that the court will not dispense with what the parties have explicitly agreed to. *Dwight v. Williams*, 4 McLean, 581; *Moakley v. Riggs*, 19 Johns., 69; *Eddy v. Stanton*, 21 Wend., 255.

Accepting for the purposes of this case the more liberal rule for the benefit of the plaintiffs, we must nevertheless hold the guaranty a conditional one, and that the condition is precedent and an essential part of the contract, and that the burden of proof was therefore on the plaintiffs to show by appropriate evidence, either that they first exhausted all legal remedies without success, or that the maker was insolvent, or that the guarantors in some proper manner waived the legal proceedings.

The plaintiffs, in lieu of a strict performance of the condition, relied upon two claims:—1st, that the maker of the note at the commencement of the present suit was notoriously and utterly insolvent, and 2d, that it was understood between the maker, guarantors and payees of the note at the time of its execution and delivery, that the maker had signed it without consideration, at the request and for the accommodation of the guarantors, and upon their promise that they would take care of it and pay it within a short time from its date.

The questions arising under the first claim will be hereafter considered in connection with the charge to the jury.

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The second claim will be considered first, in connection with the objections to the admissibility of the testimony offered by the plaintiffs to sustain it. The motion states the evidence as follows:—

The plaintiffs offered evidence in chief to prove that some time prior to November, 1871, the Bartram & Fanton Sewing Machine Company was indebted to the plaintiffs in the sum of \$7,000 and was being pressed for payment; that William P. Seeley, one of the defendants, and who was acting and managing for the company, of which he was a stockholder, in paying off its debts, proposed to the plaintiffs, that as the company would want to use what ready money it had, it would get up a note and get some one to sign it, whom the stockholders, or some of them, would indemnify, and would sign as guarantors on the back of the note, and that they thought they could get Charles Benedict to let them use his name; that thereafter Charles Hull, one of the defendants, and also a stockholder in the company, went to Benedict for the purpose of inducing him to lend his name as maker of the proposed note, and for that purpose promised him that he should never be called upon to pay the note and that no harm should ever come to him on account of his signing it, but that the guarantors would pay it; that afterwards Hull and Seeley gave the note to the plaintiffs in accordance with their proposition so to do, and they and the other guarantors, all of whom were stockholders in the company, told the plaintiffs that they had got Benedict's name, and had agreed to protect him and to pay the note and that no harm should come to him from signing it, and that the plaintiffs accepted the note in payment of their claim against the company; that afterwards Benedict also informed the plaintiffs that the defendants had promised to protect him, and that it was agreed when he signed the note that he was not to pay it and should have no trouble with it, but that the parties who signed on the back of it should take care of it.

That part of the evidence which details a conversation between the plaintiffs and Benedict, after the transaction,

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and not in the presence of the defendants, wherein Benedict told the plaintiffs "that the defendants had promised to protect him, and that it was agreed when he signed the note that he was not to pay it, and should have no trouble with it, but that the parties who signed on the back of it should take care of it," was not only matter *inter alios*, but as against the defendants pure hearsay evidence which was too clearly inadmissible to justify discussion.

Most of the remaining evidence objected to goes to establish at the very inception of the note a verbal agreement in direct conflict with the written guaranty. But we must not fail to give due prominence and consideration to the express disclaimer on the part of the plaintiffs and the court that the evidence was offered or received for the purpose of contradicting the note or guaranty, but only to excuse the plaintiffs' failure to test the collectibility of the note by first bringing suit against the maker.

But notwithstanding the disclaimer it seems to us that the evidence was admitted in violation of the spirit and reason of the rule, and it had the precise effect which would result from a material change in the contract.

But it may be suggested that if parol evidence of a subsequent promise does not vary the contract, neither will an antecedent or contemporaneous verbal agreement. We think however there is good ground for a distinction between antecedent and subsequent transactions in this regard, arising from the reason of the rule which excludes parol evidence and which merges all previous conversations and negotiations in the deliberate language of the written contract. To adopt the language of Judge NOTT, in *McDowall v. Beckley*, 2 Constitutional Reports (S. C.), 265,—"The various conceptions of different minds on the same subject, the liability of all persons to forgetfulness, the influence of passion, prejudice or interest, render unwritten contracts at all times uncertain. But *litera scripta manet*. It cannot change with times and circumstances, and when a contract is reduced to writing, the law presumes the writing to contain the whole agreement." In *Stone v.*

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Rockefeller, 29 Ohio St., 625, which was an action on a written guaranty of the collectibility of a note, the court say:—"The law will not supply any condition which is not incorporated into the agreement, or fairly implied from the language used; and in the absence of fraud, accident or mistake, it is presumed conclusively that the terms of the contract, as agreed between the parties at the time, are fully expressed in the written guaranty."

But the plaintiffs in effect say, we do not vary the contract between us and the defendants; there it is, intact on the back of the note; we base our action upon it. But how is it preserved intact? From the same transaction, from the same conversation, at the same time and place, between the same parties, and upon the same subject matter, the court allows to be proved two contracts, side by side, one written, the other verbal; one a conditional guaranty, the other an absolute promise to pay the note without any condition whatsoever. But which is to prevail? Why, the written, of course, say the plaintiffs. But how? Only in name, while the contemporaneous verbal contract under cover of the doctrine of waiver in effect nullifies it. Now it seems to us that this is a case for the application of the presumption that the whole of the agreement was committed to writing. This case strikingly illustrates the necessity and wisdom of the rule. There never was an instance of more direct and palpable contradiction. It is incredible that the parties talked one thing and wrote another so different at the same time and place and with the same motives. If any waiver was agreed to and any promise made, it was most natural to insert it in the writing. But afterwards, with a change of circumstances and motives, it is reasonable to expect that parties may waive some provision of a previously written contract; so that a contemporaneous and subsequent waiver do not rest on the same ground.

In *Goodwin v. Buckman*, 11 Iowa, 308, cited by the plaintiffs to support the admission of this evidence, there is a clause in the opinion which seems to concede that there is

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ground for the distinction which we have been discussing. That, like the case at bar, was an action on a guaranty of the collectibility of a note. The waiver relied upon was, "that after the note matured the defendant told the plaintiff not to sue it and that he would pay it himself." WRIGHT, J., in giving the opinion, says:—"Treated as a conditional promise, the guarantor, as a general rule, is bound only in the event that the holder shall use diligence to collect it of the maker. But that the use of this diligence may be waived by the guarantor we have no doubt. And if, at his instance and request and upon faith of his promise, the diligence is not used, he is liable. *It may be admitted that a parol agreement, made at the time of the guaranty, to waive the use of diligence, would not be admissible because of its conflict with the written agreement.* * *

In this case, however, the proof in no sense contradicted the written guaranty, any more than proof of the waiver of laches in the case of an ordinary indorsement of negotiable paper."

The case of *Cowles v. Townsend & Milliken*, 31 Ala., 183, is distinguishable from the case at bar in several respects, yet the reasoning of STONE, J., in giving the opinion, we think is applicable. It was an action by payees against the acceptor of a bill of exchange, in which the defendant offered to prove by parol that he accepted the bill under a verbal agreement with the payees to the effect that, if the bill was not paid at maturity, the payees should not call upon him until they had prosecuted the drawers to judgment or insolvency and used all proper means to collect the same. The judge says:—"The contract declared on in this case is an absolute primary obligation to pay money. The testimony which the court rejected was offered with a view of proving a contemporaneous oral agreement of the parties, that the liability of the appellant was not absolute and primary, but contingent and secondary. Thus viewed a more palpable attempt to vary by parol the terms of a written contract cannot be presented."

We have not been able to find any case where a parol

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contemporaneous agreement was admitted for the purpose of showing waiver in an action upon a written guaranty like the one under consideration. It is claimed however by the plaintiffs that the law is well settled that an indorser of a note may by parol waive demand of payment and notice of dishonor of a bill, and that it may even be inferred from circumstances, and the authorities they cite undoubtedly sustain the claim. But such a waiver is a different thing from the waiver of the collectibility of a note prescribed by the parties in their contract; and a waiver of a condition in the contract at its inception is very different from that founded on subsequent transactions or promises. And, as to waiver of demand and notice in the case of an indorser, it ought to be remarked that in *Leffingwell v. White*, 1 Johns. Cas., 99, *Minturn v. Fisher*, 7 Cal., 573, and *Yeager v. Farwell*, 13 Wall., 6, it was held "that as the written indorsement is the highest and best evidence of the indorser's contract, it could not be varied or modified by a parol promise, and that consequently a contemporaneous verbal promise by the indorser, to pay the note in the event the maker did not, would not dispense with notice of dishonor." But we concede that this view is against the preponderance of legal authority.

Among the ablest opinions in opposition to the above proposition is that of Judge LOWRIE, in *Barclay v. Weaver*, 19 Penn. St., 396, where it was held that a contemporaneous verbal promise by an indorser to pay the note will dispense with notice of dishonor. But we think the reasoning in support of this decision suggests sufficient grounds for distinguishing the case from the one at bar, so that it does not essentially impair the strength of our position. The same judge had decided the other way in the court below, and when the question came to the Supreme Court for review, he said:—"My error consisted in the assumption that the law regards an indorsement as a written contract to pay on condition that the usual demand be made and notice given. It is not so. For where the indorser is himself the real debtor, as in the case of accommodation notes

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and bills, or has taken an assignment of all the property of the maker as security for his indorsement, or where he can have no remedy against the maker, or in the case of the drawer of a bill of exchange where the drawee is, and during the currency of the bill continues to be, without funds of the drawer, demand and notice are not necessary.

* * * The most therefore that can be said of an indorsement of negotiable paper is, that from it there is *implied* a contract to pay on condition of the usual demand and notice; and that this implication is liable to be changed on the appearance of circumstances inconsistent with it, whether those circumstances be shown orally or in writing. But it may well be questioned whether the condition of demand and notice is truly part of the contract, or only a step in the legal remedy upon it." Then, after a very able argument to sustain this position, the opinion concludes as follows:—"It seems therefore that the duty of demand and notice in order to hold an indorser, is not a part of the contract, but a step in the legal remedy, that may be waived at any time, in accordance with the maxim, *quilibet potest renunciare juri pro se introducto*. And certainly an indorsement is not regarded as a written contract so far as to prevent oral proof that its terms differ from the ordinary contract of indorsement."

If the above reasoning is correct, then it is clear that all the authorities cited by the plaintiffs relative to the waiver of demand and notice as to indorsers of notes have no force or pertinency in the case at bar, for the authorities (without an exception we believe) hold that in a written guaranty like the one now under consideration, the collectibility of the note by legal proceedings is not only an essential part of the contract, but a condition precedent to the right of recovery; the only difference being on the question whether it is possible, without making a new and independent contract, to waive the test of collectibility by actual suit, or whether the fact of insolvency will excuse the bringing of the suit. We conclude therefore that the evidence referred to was not admissible to show a waiver of an essential part of the written contract.

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But it was claimed in the argument that, if not admissible to show waiver, it would be to estop the defendants from insisting on the condition. We think however that the same reasoning applies to the latter as to the former, and with equal strength. And in lieu of a more particular discussion of the doctrine of estoppel as applicable to such a case, we cite, as furnishing strong confirmation of our position, the case of *Insurance Co. v. Mowry*, 96 U. S. Reps., 544, where it was held (Mr. Justice FIELD giving the opinion,) that "promissory representations as to future action dependent upon a contract to be entered into, do not create an estoppel. A promise of agents of an insurance company, that if a party will take out a policy he shall be notified when to pay the annual premiums before he shall be required to pay them, will not, although such notice is not given, estop the company from setting up the forfeiture which, according to the terms of the policy subsequently accepted, was incurred on the non-payment of the premium when due. The policy as issued and accepted must, in a court of law, be taken as expressing the final agreement of the parties, and as merging all previous verbal stipulations. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine carried to the extent for which the assured contends would subvert the salutary rule, that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent." Citing *White v. Ashton*, 51 N. York, 280, which is in point, and other authorities.

The other reason given by the plaintiffs for not attempting to collect the note out of Benedict was, that the attempt would be vain by reason of insolvency, and this fact they offered evidence to prove. On the contrary, as the motion states, "the defendants offered evidence to prove that Benedict, at the time he signed the note, was of abundant pecuniary ability to pay the same; that from that time continuously until April 28th, 1873, more than \$30,000

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worth of property in Danbury stood in Benedict's name and belonged to him; that on that day he transferred all of his property to his wife, who still holds possession of more than \$25,000 worth of it; that the only consideration for this transfer was the purchase by Mrs. Benedict, in 1863, of certain debts amounting to \$23,000 in favor of certain creditors against her husband for fifteen per cent. of the face value of the same, and a debt of \$4,500 due from Benedict to Mrs. Benedict's father and which had been set out to Mrs. Benedict upon the distribution of her father's estate; that Mr. and Mrs. Benedict were married in 1828, and that the money with which she purchased the debts was the proceeds of property given to her by her husband at a time when he was not indebted; that the transfer was made because one Burr had three days previously brought a suit against Benedict for the claimed illegal use of a patent right, and that Mr. Taylor, one of the plaintiffs, drew, witnessed and took the acknowledgment of the deed. It was conceded that the plaintiffs had been the holders of the note continuously since its inception, and that Mr. Taylor had advised Benedict not to pay it as it would be unfair and unjust."

Upon the evidence in the case the defendants claimed, and asked the court to charge the jury, that if they found the facts concerning the transfer from Benedict to his wife as claimed by the defendants, such transfer was void as to the plaintiffs; that the plaintiffs could still have collected the note in suit out of the property, and that it was their duty to have done so; that if the jury found the facts as claimed by the defendants, then Benedict was still solvent when the present suit was brought, so far as the plaintiffs were concerned; and that, if this was not so, the plaintiffs had by their own fraudulent co-operation with Benedict in the transfer, rendered him insolvent, and therefore could not recover of the defendants. The court refused so to charge, but charged as follows:—"It is a question of fact for you to decide, whether or not Benedict was insolvent when this suit was brought. The defendants claim that he

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was not insolvent, because the transfer of April 28th, 1873, was fraudulent and void. If you find the transfer was made to defraud Burr, it would be void as to that claim, but our statute prevents it from being void as to any one except him whose debt was sought to be avoided. It is claimed that the transfer is void for inadequacy of price, as to creditors. I don't understand that any creditors are here asking to be heard. I think that the transfer should be treated, so far as this suit goes, as a valid transfer."

The court also, in charging the jury in reference to the fourth, sixth and tenth written requests of the defendants, in different forms of expression re-iterated and emphasized the idea that under our statute no transfer of property would be invalid against any existing creditor unless it was made with the specific intent to defraud such creditor. And the jury must have understood that though they should find that Benedict conveyed his property to his wife with the fraudulent intent to avoid the Burr claim, yet the plaintiffs, though then his creditors, could not attach and hold the property in a suit upon the note in question.

Is this correct? The statute (Revision of 1875, p. 345, sec. 1,) is as follows:—"All fraudulent conveyances, suits, judgments, executions, or contracts, made or contrived with intent to avoid any debt or duty belonging to others, shall, notwithstanding any pretended consideration therefor, be void as against those persons only, their heirs, executors, administrators or assigns, to whom such debt or duty belongs."

It was held in *Benton v. Jones*, 8 Conn., 186, that this statute was substantially copied from that of the 18 Eliz., c. 5, and must receive a similar construction. And in regard to the latter, and to similar statutes in other states, it is well settled that "it is not necessary to establish a specific design to delay, hinder or defraud the particular creditor who assails the transfer, for the intent to delay, hinder or defraud one particular creditor, renders the transfer void as to all." Bump on Fraudulent Conveyances, 28;

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Miner v. Warner, 2 Grant, 448; *Hoke v. Henderson*, 3 Dev., (N. C.,) 12; *Gruder v. Boyles*, 1 Brevard, (S. C.,) 266; *Warner v. Percy*, 22 Verm., 155; *Tuberville v. Tipper*, Palmer, 415, (note); *Rex v. Nottingham*, Lane, 42.

But our attention has been called to the difference of phraseology between our statute and that of 13 Eliz. While conceding that the difference gives some color for a different construction and that a strict and literal rendering of our statute might justify the charge of the court below, yet the following considerations will show that the construction given was not the proper one.

1. As the statute was enacted "for the suppression of fraud, the advancement of justice and the promotion of the public good," it should be liberally and beneficially construed "to suppress the fraud, abridge the mischief and enlarge the remedy." *Twyne's Case*, 3 Coke, 80; Bump on Fraudulent Conveyances, 12.

2. The only difficulty in our statute is that it seems to restrict the remedy to that creditor only whose debt was intended to be avoided. But it should be borne in mind that every person is conclusively presumed to intend the natural and necessary consequences of his acts. If therefore *A* is indebted to *B*, and also to *C*, and makes a fraudulent conveyance with the specific intent to avoid the debt to *B*, the necessary effect is (and he knows it,) to avoid also the debt to *C*; and so by simply applying the proper rule of evidence, both debts may be brought not only within the meaning but within the very words of the act.

3. The statute is declaratory of the common law, which is still in force and which "supplements the statute to the end that justice may be done." Bump on Fraudulent Conveyances, 11; *Fox v. Hills*, 1 Conn., 295; *Benton v. Jones*, 8 Conn., 186; *Hall v. Sands*, 52 Maine, 358; 2 Swift's Digest, (Rev. ed.,) 260.

As to the thirteenth written request, relative to the effect of a subsequent promise by the guarantors after laches on the part of the guarantee, it was obviously founded on the New York rule and other decisions to which we have re-

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ferred, but which we have not adopted to the extent that is assumed in the proposition referred to. We deem it unnecessary to discuss the matter further; only we would suggest, by way of criticism, that the proposition was an abstract one, and was not in form based upon specific facts claimed to have been proved, but, assuming that facts might exist whereby the remedy was lost, the court was asked to rule as matter of law that a subsequent promise could have no effect. No facts were conceded upon which the court could say that the plaintiffs' remedy was lost; and it would have been unjust to the plaintiffs so to have assumed in giving instructions to the jury, without making the necessary qualifications.

As there are other grounds for a new trial, it will not be necessary to consider particularly the neglect of the court to comply with the statute (Revision of 1875, p. 442, sec. 2,) which requires a written charge upon written requests. To avoid, however, giving encouragement to such omissions, we will merely say that it would undoubtedly be ground for granting a new trial unless waived by the party making the requests, or unless it appeared that it occasioned no injury.

We have had no occasion for considering the peculiar character of the guaranty, as one of the collectibility of the note "till paid," since the present suit was brought before any proceedings had been instituted for the collection of the note out of the maker.

A new trial is advised.

In this opinion the other judges concurred.

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Quintard v. Corcoran.

WALTER C. QUINTARD, TREASURER, vs. PATRICK CORCORAN AND OTHERS.

A person licensed by the county commissioners to sell intoxicating liquors in a certain town, gave a bond to the treasurer of the town with sureties, as required by law, in the sum of \$1,000, the condition of which was that if he "should duly observe all laws relating to intoxicating liquors" it should be void. Held—

1. That the keeping open a place on Sunday where intoxicating liquors were exposed to sale was a breach of the bond, although the act was forbidden by a statute with regard to Sunday and not by that relating to intoxicating liquors.
2. That it was not necessary that the bond should provide in terms that its amount was to be forfeited upon a breach, that being necessarily implied.
3. That it was not necessary that the act constituting a breach of the bond should be merely an abuse of a privilege granted by the license.
4. That it was not necessary that the plaintiff should have sustained any damage by reason of the breach of the bond.
5. That the \$1,000 was the measure of damages.

It is admissible to prove the time when a certain occurrence, foreign to the case, took place, for the purpose of fixing by it the time when a certain act, within the case, was done.

CIVIL ACTION on a bond given by the defendants to the plaintiff as treasurer of the town of Norwalk, for the observance of all laws relating to intoxicating liquors by the defendant Corcoran, who had been licensed by the county commissioners to sell liquors in said town; brought to the Superior Court, and tried to the jury before *Hitchcock, J.* Verdict for the plaintiff, and motions in error and for a new trial by the defendants. The case is sufficiently stated in the opinion.

G. Stoddard and J. S. Seymour, in support of the motions.

L. D. Brewster, and H. B. Scott, contra.

PARK, C. J. This is a suit on a bond of one thousand dollars given to the treasurer of the county of Fairfield, to

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which was attached the following condition:—"The condition of this obligation is such, that whereas the above bounden Patrick Corcoran has this day been licensed by the board of county commissioners of the county of Fairfield to sell intoxicating liquors in the town of Norwalk in said county—now if the said Patrick Corcoran shall duly observe all laws relating to intoxicating liquors during the time covered by said license, and also shall pay all damages arising from sales of intoxicating liquors made by him during said time, and which shall be recovered from him under and pursuant to the provisions of part 1, chap. 14, title 16, of the General Statutes of this state, then this bond is to be void, otherwise of full force in the law."

On the trial of the case in the court below the defendants demurred to the complaint for the following reasons:—

1. Because the complaint and the matters therein contained do not show that the defendant Corcoran has not duly observed all laws relating to intoxicating liquors, within the meaning of the statute in such case provided.

2. Because the facts alleged in the complaint and assigned as a breach of the condition of said bond do not constitute a breach of said condition.

3. Because said bond is void for uncertainty.

4. Because the acts of said Corcoran alleged to be a breach of the condition of said bond, and a breach of said law relating to intoxicating liquors, do not constitute an abuse of any privilege conferred on him by the license recited in the condition of said bond.

The court below adjudged the complaint to be sufficient, and the case comes here for a review of that decision, as well as for a revision of other rulings of the court in the trial of the cause upon its merits.

The first, second and fourth grounds of demurrer seem to be based upon the claim that the offense charged in the complaint is not one relating to intoxicating liquors, and that therefore no breach of the condition of the bond has been alleged. But the case of *The State v. Wolfarth*, 42 Conn., 155, fully decides this question, and adversely to the

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claim of the defendants. One of the questions in that case was whether a prosecuting agent appointed by the county commissioners could lawfully prosecute for a breach of the statute prohibiting the keeping open on Sunday of any place in which it was reputed that intoxicating liquors were kept for sale. Prosecuting agents had no authority to prosecute other breaches of the criminal law than those pertaining to intoxicating liquors. The statute on this subject is as follows:—"The county commissioners of each county shall appoint one or more persons residing therein to be prosecuting agents, who shall diligently inquire into and prosecute all violations of the laws relating to the sale of intoxicating liquors," &c. The court held that the statute there in question was a statute relating to the sale of intoxicating liquors, and that therefore the prosecuting agent had authority to prosecute the complaint.

The distinction attempted to be made between the case cited and the one under consideration is, that that case did not require a strict construction of the statute, while the present one does; that in that case it was a matter of indifference to offenders who the prosecutor was—whether the proceeding was instituted by a prosecuting agent appointed by the county commissioners, or by a grandjuror elected by the town.

We fail to see the force of this claim. The prosecuting agent either had full authority to institute the proceeding in that case or he had none whatever; and if he had none, then the proceeding was *coram non judice*, and was wholly void. Neither can it be said that it is a matter of indifference, either to the law or to the offenders themselves, whether or not they are prosecuted according to law. It is the endeavor of all courts that if offenders are found guilty they shall be found so in conformity to the strict law of the land. It often occurs that judgments are reversed and new trials ordered on technical points which could not have done the accused any harm.

Again, the defendants claim that the statute, which provides that "before any person shall receive a license he

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shall file with said commissioners a joint and several bond to said county in one thousand dollars, with sufficient surety, for the due observance of all laws relating to intoxicating liquors," is not sufficient of itself to warrant the conclusion that if such person does not duly observe such laws he shall forfeit the sum named in the bond, or any part thereof; that it is necessary that the statute should go further and expressly declare that such shall be the consequence if the licensed person shall not duly observe all laws relating to intoxicating liquors; that penal statutes must be construed strictly, and that nothing can be inferred beyond the strict letter of the act.

We think there is nothing in this claim. The statutory requirement, that before any person shall receive a license he shall give a bond to the county with sufficient surety for the due observance of all laws relating to intoxicating liquors, means that he shall give a bond in the usual form, with a condition annexed thereto that if he duly observes all laws relating to intoxicating liquors the bond shall be void, but shall remain in full force against him if he violates any one of those statutes. Wherever the statute requires a bond to be given for the faithful performance of some trust or duty, nothing more is said in relation to it than is said in this case. It is never provided in express terms that if the trust or duty is not faithfully performed the bond shall be broken. This is necessarily involved in the requirement that a bond shall be given for such faithful performance.

Again, it is said that the bond is void for uncertainty, so far as it refers to laws relating to intoxicating liquors. Those laws are matters of statute, and the defendants could have easily ascertained what they required of them. Indeed they were bound to inform themselves in order to know what acts their license gave them the right to do. There is no force in this claim.

Again, it is said that the bond was given on taking out a license, and its condition therefore can only be broken by the abuse of some privilege conferred by the license; and

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that in respect to the acts claimed to be a breach of the bond the licensed and the unlicensed stand upon the same ground. According to this claim it is difficult to see how the bond could be broken; for a breach of the bond must necessarily be the doing of some act that the licensee gave the licensee no right to do. So far as the abuse of some privilege conferred by the license is concerned, what is the difference between selling intoxicating liquors to a minor, and keeping open a place on Sunday for the sale of such liquors? If it be said that in the one case the licensee has the right to sell such liquors to certain persons, which act the unlicensed has no right to do, and that therefore selling to a minor is the mere abuse of his privilege to sell such liquors, then it might be said in the other case, with equal propriety, that the licensee has the right to keep open his place for the sale of liquors during six days of the week, which act the unlicensed has no right to do, and that therefore keeping open his establishment during the remaining day of the week is a mere abuse of the privilege granted by his license. We think this distinction is not well taken.

The first objection to the evidence offered by the plaintiff on the trial has already been considered, and needs no further comment.

During the trial the plaintiff offered a witness to prove the allegations of the complaint, that the defendant Corcoran kept open his establishment on Sunday. The witness testified to the fact but was unable to state when it occurred. He knew it took place on the Sunday before a certain trial was had. To prove the date of the trial, and thus to prove when the act was done, the plaintiff offered in evidence the record of the trial. The defendant objected to the evidence, but the court received it for the sole purpose of fixing the date when the trial occurred, and thereby proving, in connection with the testimony of the witness, when Corcoran kept open his establishment. We think the ruling of the court was strictly correct. Nothing is more common than to prove the date of one transaction by the date of another, in circumstances like those of the present case.

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The remaining question has relation to the charge of the court.

The defendants claimed, and asked the court to charge the jury, as follows:—

“1. That the plaintiff cannot recover in this action unless he proves that he has sustained some damage by the acts of the defendants, alleged in the complaint.

“2. The plaintiff can recover in this action only such sum as the jury find from the evidence to be equal to the actual damage he has sustained by reason of the acts of the defendants alleged in the complaint.

“3. The one thousand dollars, the sum mentioned in the bond in this suit, is not to be considered as the matter in demand, or as the measure of damages in this action, but only as the extreme limit beyond which the jury cannot go in assessing damages. Within that limit the jury can assess as the damages in this case, if they find that the bond is forfeited, only such sum as the evidence shows to be equal to the damages the plaintiff has actually received.”

“The court charged the jury as follows:—“If on the question of keeping open the saloon you find for the plaintiff, then you will consider the question of damages, and in regard to this you may consider that the bond itself furnishes the measure of damages. If you are satisfied that the place was kept open as alleged, you are to take the measure of damages from the bond itself.”

We think there is no error in this charge. Manifestly the plaintiff suffered no pecuniary damage by the acts of Corcoran in keeping open his establishment on Sunday; neither would he in any case by a violation of any law relating to intoxicating liquors; and the statute, requiring a bond to be given for the due observance of all laws in this regard, might as well be dispensed with, if only the real pecuniary damage which the plaintiff suffers can be recovered. And it is equally manifest, that the legislature put no such construction upon this part of the statute, for if they had it would never have been enacted. The intent of the legislature was, that the persons to whom they

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should grant licenses to deal in intoxicating liquors, the excessive use of which causes more pauperism, misery and crime than all other causes combined, should especially keep the statutes enacted to regulate this great evil; and should they violate them, they should be punished for the offense more than others to whom this trust had never been confided. We think the legislature intended that the full amount of the bond should be forfeited in a case of this character. This question has arisen in Rhode Island and been decided in the same way. *Tripp, Treasurer, v. Norton*, 10 R. Isl., 125; *City of Providence v. Bligh et al.*, 10 R. Isl., 208.

There is no error, and a new trial is not advised.

In this opinion the other judges concurred.

JEAN HORNIG *vs.* WILLIAM E. BAILEY AND OTHERS.

The statute (Gen. Statutes, p. 270, sec. 5,) provides that a complaint for a search warrant for liquors kept for sale contrary to law, and also the search warrant, shall describe the place where kept "with reasonable certainty." A complaint described the place as follows:—"Near the corner of *E.* street in the borough of *D.* in a wooden building occupied by *J. H.*, consisting of a one story building and garden attached thereto and occupied as a place of public resort; also in another wooden building between the first mentioned and the *D. N.* office, and the cellar of said wooden building, used by said *J. H.* as a dwelling house; which said liquors are so owned and kept at said place." The search warrant described the premises in the same manner, except that it used the word *places* for *place*. Held that the place was described with reasonable certainty. "The cellar of said wooden building" was to be taken to mean the cellar of the wooden building then being described. And the allegation of the complaint that the liquors were kept "at said place" did not vitiate the warrant by its uncertainty, because it might be understood as applying to the whole premises described, and also might be stricken out as surplusage. And held that the warrant was not void for not stating that a complaint had been made and by whom, that three residents of good moral character had made oath to the complaint, and that the justice had reason to

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believe that liquors had been sold in the dwelling house contrary to law, since all this appeared in the complaint and the certificate of the justice attached to it, both of which were on the same paper with the warrant and a part of the process.

CIVIL ACTION for breaking and entering a dwelling house and store of the plaintiff and carrying away a quantity of beer and the vessels containing it; brought to the Superior Court, and tried to the court, on an answer setting up that the articles were taken upon a warrant for the search for and seizure of liquors, before *Hitchcock, J.* Facts found and judgment rendered for the plaintiff, and motion in error by the defendants. The case is fully stated in the opinion.

W. Burke, for the plaintiffs in error.

D. B. Lockwood and *H. W. Taylor*, for the defendant in error.

CARPENTER, J. The complaint alleges that the defendants broke and entered the store and dwelling house of the plaintiff, and the seizure and detention by them of beer and the vessels containing the same, the property of the plaintiff. The answer sets out a complaint and warrant for searching the premises and seizing liquors kept therein for sale contrary to law. The court found that the acts complained of were done in serving the warrant, and held that the complaint and warrant were void, and rendered judgment for the plaintiff. The defendants filed a motion in error.

The statute requires that the complaint for a search warrant shall allege that intoxicating liquor, "described as to the kind, and the place, and owner or custodian thereof, with reasonable certainty," is owned or kept for sale contrary to law; and also that the warrant shall describe "in the manner aforesaid, said liquors, place, and owner or custodian."

The question is whether the complaint and the warrant thereon issued conformed to this statute.

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No question is made in respect to the descriptions of the liquor or the owner or custodian thereof; but it is contended that the places to be searched are not described "with reasonable certainty."

The places are described in the complaint as "in said Danbury, near the corner of Elm street, in the borough of Danbury, within said town of Danbury, in a wooden building occupied by Jean Hornig, of said Danbury, consisting of a one story building, and a garden thereto attached and occupied as a saloon and place of public resort; also in another wooden building situated between the Danbury News office and the said one story building used as a saloon, and the cellar of the said wooden building described above, and used by the said Jean Hornig as a dwelling house; all of said buildings being within the town and borough of Danbury, and which said liquors are so owned and kept at said place."

In the warrant the two buildings are described substantially in the same words; and following the description are these words:—"in which said places it is said and complained and alleged that certain intoxicating liquors are now owned by said Jean Hornig and kept by him, and are intended by him to be sold contrary to law." Then follows a description of the liquors.

We think the two buildings are described with reasonable certainty. The one story building with a garden attached is described as a saloon and a place of public resort. With a little attention there is no difficulty in understanding the precise meaning of the description. The second building with a cellar is the dwelling house. There may be a little ambiguity in the expression "and the cellar of the said wooden building described above," as there are two such buildings described, but we think it reasonably clear that that is intended to apply to the second or the building then being described.

It will be noticed that in the complaint it is alleged that the liquors were kept in said *place*. If the word *place* refers to one of the buildings only there is an uncertainty

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as to which one of them is intended, but if used in a broader sense as including both buildings, a sense in which the word is often used, there is no uncertainty. In the warrant in the same connection the plural is used—"places." Even if we concede that the word is used in the same sense in both places, we do not think the uncertainty in the complaint vitiates the warrant, for aside from that allegation the complaint clearly avers that the liquors (describing them,) were owned and kept "in a wooden building," &c.; also "in another wooden building," &c.; so that the words "at said place" may be stricken out without vitiating the complaint. That being so, and the warrant being explicit and grammatically correct so far as this point is concerned, the proceeding was not void.

It is further contended that "the warrant does not state that complaint has been made, nor by whom;" that "it does not state that three residents of good moral character of full age have made oath;" nor "that one at least of the complainants has made oath that he believes intoxicating liquor has been sold in the dwelling house in violation of the law;" nor "that the justice had adequate reason for believing that liquors had been sold in said dwelling house in violation of law, or that probable cause existed for the support of the warrant."

But all these requisites do appear in the complaint and the certificate of the magistrate thereto attached, both of which are on the same paper with the warrant and are an essential part of the proceeding. The statute does not require that these facts should be stated in the warrant itself, and we think it is enough if the record shows that all the formalities required by the statute have been observed.

There is error in the judgment, and it is reversed.

In this opinion the other judges concurred.

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THOMAS B. FANTON *vs.* HUBBELL MIDDLEBROOK.

The presumption of payment that exists in the case of a judgment that has run twenty years, is sufficient if not rebutted; but the fact that the judgment has not been paid may be shown.

And it makes no difference that the judgment was rendered in another state.

Nor that by the statute of that state no action could be brought upon it unless within six years from the time it was rendered.

ACTION on a judgment; brought to the Court of Common Pleas, and tried to the court before *Hall, J.* Facts found and judgment rendered for the plaintiff, and motion for a new trial by the defendant. The case is sufficiently stated in the opinion.

O. A. G. Todd, in support of the motion.

S. Tweedy, contra.

PARK, C. J. In the month of April, 1858, the plaintiff recovered judgment against the defendant before a justice of the peace in the state of Michigan, for the sum of two hundred and thirty-four dollars debt and costs of suit. Since that time the plaintiff has resided in this state, but the defendant has resided elsewhere. One of the statutes of Michigan provides that no action shall be maintained or execution issued, except within six years, upon any judgment of any court, not a court of record. It is found that the judgment has in fact never been paid.

The defendant claimed on the trial that inasmuch as twenty years had elapsed between the date of the judgment and the commencement of this suit, the law conclusively presumed that the judgment had been paid, and requested the court so to rule. The court ruled otherwise, and this raises the first question in the case.

In the recent case of *Chapman v. Loomis*, 36 Conn., 459, it is held that the presumption of payment of a judgment

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arising from lapse of time, is a rebuttable presumption, which will be sufficient if unexplained and uncontradicted; but that the real fact can always be shown. It does not alter the case that the judgment was rendered in another state. We might cite many authorities from other states to the same effect. There is nothing in this claim.

The defendant requested the court to rule, that by the statute law of Michigan a justice court is not a court of record; that no action could have been maintained upon the judgment in that state but within six years from the time when it was rendered; and that all defences, which would have been available to the defendant in that state, had the action been brought there, could be made in this state. The court did not so rule, and this is assigned as error.

The defendant does not seem to apprehend the nature of a statute of limitations. Such a statute does not extinguish the debt. It merely deprives the creditor of a right of action to recover the debt. The language of the statute of Michigan is—"no action shall be maintained," &c. This statute has no extra-territorial effect. It is confined to the state where it was enacted. It is a principle of universal application that remedies and modes of procedure depend upon the *lex fori*. The following authorities are a complete answer to the defendant's claim upon this point. *Medbury v. Hopkins*, 3 Conn., 472; *Atwater v. Townsend*, 4 id., 47; *Beckwith v. Angell*, 6 id., 322; *Wood v. Watkinson*, 17 id., 500; Story on Conflict of Laws, § 582.

A new trial is not advised.

In this opinion the other judges concurred.

Harral v. Leverty.

EDWARD W. HARRAL vs. ALEXANDER LEVERTY AND OTHERS.

A party taking possession of land under a contract of sale and in expectation of a conveyance under the contract, is not holding adversely to the legal owner, and he can change his licensed possession into an adverse one only by explicit acts which give the owner notice of such adverse holding.

A party in possession in such a case is not properly a tenant at will, but a mere licensee.

A conveyance of land of which the grantor is ousted, made to a party to whom the grantor, before the ouster, had contracted to convey it, is not within the statute against selling pretended titles.

If the grantee was, upon any ground, equitably entitled to a conveyance, it would be valid although the land was held adversely by a third party. A mortgage is not a "conveyance" under the statute against selling pretended titles.

Where *A* was equitably entitled to a conveyance of certain premises, and was in open and adverse possession, and the legal owner in fraud of his rights made a mortgage of the premises to a party who was ignorant of *A*'s possession and of any equity on his part and who made the loan in good faith, it was held that he was not to be charged with notice of *A*'s equity by reason of his having searched only the record title and not having inquired who was in possession.

A defendant, by a counter-claim under the Practice Act, can not bring in for adjudication any matter that is not so connected with the matter in controversy under the original complaint that its consideration by the court is necessary to a full determination of the rights of the parties as to such matter; or, if it is of a wholly independent character, is a claim upon the plaintiff by way of set-off, and not a claim against a co-defendant.

The Practice Act did not intend to give any wider range of equitable claim on the part of the defendant or defendants than that allowed by the settled chancery practice, by means of answers and cross-bills, in suits in equity; it being intended to allow such equitable defence in actions at law as well as in suits in equity; leaving the matters of set-off and recoupment, already available in actions at law, where they stood before the act was passed.

Where therefore, in a suit for a foreclosure, in which *A* and *B* were respondents, *A* set up in his answer that he was entitled to a conveyance of the property free from incumbrance from *B*, who held the legal title, but that *B*, in fraud of his rights, had made the mortgage in question, by reason of which he would be compelled, if the mortgage should be sustained, to pay a certain sum in redeeming the property, for which he prayed that, upon the foreclosure being granted, a judgment be rendered in his favor against *B*, it was held that he was not entitled to such a judgment.

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SUIT for the foreclosure of a mortgage; brought to the Superior Court. Facts found by a committee and a decree of foreclosure passed. Motion in error by McDonald, one of the defendants. The case is sufficiently stated in the opinion.

J. W. Parrott, for the plaintiff in error.

M. W. Seymour, for the defendant in error.

LOOMIS, J. This is a suit for the foreclosure of a mortgage and for the possession of the mortgaged premises. The principal defendant is Samuel McDonald, who claims to be equitably entitled to the mortgaged premises, and to have been in adverse possession of them when the mortgage was made by the defendant Leverty, who held the record title, as well as at the time the premises were conveyed to Leverty.

It appears from the finding that on the 24th of December, 1874, Nathaniel Wheeler and Henry Sanford of Bridgeport, who were then the owners of a piece of land on one of the streets of that city, which included the land in question, made a written contract with the defendant Leverty, under which the latter was to erect a block of five brick dwelling houses on the land, of which Wheeler and Sanford were to purchase the eastern one at a stipulated price and to convey the rest to Leverty or his assigns at a stipulated price, the price of the land being applied toward payment for the house taken by them of Leverty and the balance payable to him in cash. They also agreed to procure mortgage loans on each of the next three houses, of \$2,400 each, for the benefit of Leverty. On the same day Leverty contracted with Fones & Canfield, carpenters, to do all the wood work of the block for \$2,300, to be paid for by a conveyance to them of the fourth house in the block from the east at the price of \$4,100, they paying Leverty the difference, \$1,200, in cash. Fones & Canfield being unable to perform the contract, assigned it, with the consent of Leverty, to the

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defendant McDonald, who went on and performed it in full to the satisfaction of Leverty, and became entitled to the conveyance to him of the house which by the agreement Fones & Canfield were to receive. On the 22d of November, 1875, Leverty having accepted the work, McDonald entered into possession of the house which was to be conveyed to him, and placed tenants in it with the knowledge and approval of Leverty. He began to occupy before receiving his deed, but in the expectation of a conveyance of the premises to himself, either from Leverty, when he obtained title, or directly from Wheeler and Sanford. The premises thus occupied by McDonald are the mortgaged premises to which the present suit relates.

We have thus a contract of Wheeler and Sanford to convey the four houses of the block to Leverty on his completing the block, the contract of Leverty to convey the house in question to McDonald on his completing the wood work of the block, McDonald's completion of the wood work to the acceptance of Leverty, and McDonald's entry into possession with Leverty's consent in anticipation of the conveyance to be made to him. The rights of the parties at this point are very clear and the whole case a simple one.

Thus matters stood until a dispute arose between McDonald and Leverty as to whether the former was to pay a certain bill of lumber, the particulars of which are unimportant, but which resulted in Leverty's entering upon the premises on the 10th of January, 1876, and compelling the tenants to remove from the building, but upon McDonald's arriving there was a contest for the possession, which resulted in Leverty's locking some of the inside doors and keeping the keys and in McDonald's continuing in the general occupancy with the outside keys in his possession. The occupancy was continued until April 1st, 1881, both parties claiming during that period to have been in possession.

On the 15th of January, 1876, Wheeler and Sanford executed and delivered to Leverty a conveyance of the property which by their contract they were to convey to

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him, including the premises in controversy, which deed was soon after put upon record, and on the first of July, 1876, Leverty executed to the plaintiff, Harral, a mortgage of the house claimed by McDonald, for a loan of \$2,400; the loan being made by Harral in good faith and with no knowledge of the claim of McDonald on the property, though without making inquiry beyond an examination of the record title.

The first question is, whether at the time of the conveyance by Wheeler and Sanford to Leverty, McDonald was in such possession of the premises in controversy as to have ousted the grantors, so that their deed was void under the statute against selling pretended titles. Gen. Statutes, p. 354, sec. 15. That statute is as follows:—"All conveyances and leases, for any term, of lands or tenements of which the grantor or lessor is ousted by the entry and possession of another, unless made to the person in actual possession, shall be void."

The finding of the committee with regard to the possession of McDonald is as follows:—"I find that when McDonald entered into the occupancy of said premises on the 22d of November, 1875, he so entered, not claiming any independent title, but acknowledging and recognizing said Wheeler and Sanford and said Leverty to be the legal owners thereof; that he commenced the occupancy of the premises by permission of said Leverty, but since January 10th, 1876, has continued such occupancy against his consent. But I find that he has ever held and now holds said occupancy, setting up no complete legal title in himself, but under a claim that said Leverty and said Wheeler and Sanford, as the holders of the legal title, were bound by a contract obligation to give him a deed thereof; and I find that no notice was ever given by McDonald to said Wheeler and Sanford that he claimed to hold adversely to them."

We think it clear that upon this finding, whatever might be the character of McDonald's possession as against Leverty, it can not be regarded as adverse to Wheeler and Sanford; and as they were the parties holding the legal title at the time of their conveyance to Leverty they

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and they only were the parties whose ouster could affect the validity of their conveyance.

The authorities are numerous and agreed in support of the proposition that a party taking possession of premises under a contract of sale, and in expectation of a conveyance under the contract, is not holding adversely to the owner, and that he can change his licensed possession into an adverse one only by explicit acts on his part which give the owner notice of such adverse holding. In *Greeno v. Munson*, 9 Vermont, 37, REDFIELD, J., says, (p. 39):—"No one who goes into possession of land under another, or acknowledging the title of another, will be heard to dispute the title of that other, during the continuance of the relation. The same doctrine has been extended to the case of one who goes into possession of land under a contract of sale." The case of *Ripley v. Yale*, 18 Vermont, 220, was a case like the present one, inasmuch as it was claimed that an adverse possession made void, under a statute like ours, a deed given by one Bly, the owner, to a stranger. WILLIAMS, C. J., says, (p. 222):—"It appears that the defendant entered into possession of the premises under a contract for the purchase of the same and claiming his right under and by virtue of the contract. We believe his possession, under such a contract, can not in any view of it be deemed adverse to Bly. * * While there subsists any contract, express or implied, for the purchase of the title, between the parties in and out of possession, the possession can not be adverse.

* * Until he does some unequivocal act to manifest a repudiation of the contract and brings this home to the knowledge of the other party, he can not be considered as holding adversely to the person under whom he took possession." In *Ormond v. Martin*, 37 Ala., 598, it is held that where a party took possession under a bond for a deed and in expectation of a deed from the owner, he could not be holding adversely to the owner. The same doctrine is laid down in *Stamper v. Griffin*, 20 Geo., 312, and in *Long v. Young*, 28 Geo., 130. In the last case it is held that where a person held possession under a contract for a deed, and it

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proved that the contract was executed by a person acting as agent for the owner, but who had no authority, so that the contract had no effect, the possession still could not be regarded as adverse to the true owner. In 8 Washburn on Real Property, 142, it is said that "where one enters in subserviency to the title of the real owner there must be a clear, positive, and continued disclaimer and disavowal of the title under which he entered, and an assertion of an adverse right, brought home to the owner, in order to lay the foundation for the operation of the statute of limitations." To the same effect see *Hall v. Stevens*, 9 Met., 418.

The text books and authorities are not altogether agreed as to the precise relation to the property and to the real owner, of a person who has entered into possession under an agreement to purchase. Some of them call him a tenant at will but others a mere licensee. In either capacity he would not be allowed, until by an unequivocal act he had repudiated the relation, to deny the title of the true owner. It seems to us that his position is that of a licensee. He enters under no promise to pay rent, but merely to wait for the consummation of his right to a conveyance from the owner, while it has been held by our own court in *Vanden-heuvel v. Storrs*, 3 Conn., 203, that he is not liable for use and occupation. This view of his character is taken by the Supreme Court of the United States in *Burnett v. Caldwell*, 9 Wall., 290. SWAYNE, J., delivering the opinion of the court, says:—"If the contract stipulates for possession by the vendee, or the vendor puts him in possession, he holds as a licensee. The relation of landlord and tenant does not subsist between the parties. The characteristic feature of that relation is wanting. The vendee pays nothing for the enjoyment of the property. The case comes within the category of a license. In such cases the vendee can not dispute the title of the vendor any more than a lessee can question the title of his lessor." This view is supported by numerous authorities cited by the learned judge. It is enough for the present case that McDonald was in a position in which his possession could not be regarded as adverse to the owner.

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But if the possession of McDonald could be regarded as adverse to Wheeler and Sanford, it does not follow that their deed to Leverty would be void. A conveyance made under a valid prior contract to convey is not in contravention of the statute. Such a contract made after the owner was ousted of course could not support a conveyance made while the ouster continued. But where made before it is a valid contract, and under it the purchaser acquires an equitable right which is not to be defeated, nor its right to a consummation in a legal title affected, by an after occurring ouster of the owner. In *Gunn v. Scovil*, 4 Day, 284, it is held that a conveyance by a mortgagee after the mortgage was satisfied, the mortgagor having since been ousted, was not within the statute. Here the ouster of the mortgagor was an adverse possession as to the mortgagee as well as the mortgagor. REEVE, J., in giving the opinion of the court, says, (p. 240):—"If *A* should contract by a written agreement with *B* to sell to him blackacre for \$1,000, and to convey the same within three months, and in the meantime *C* enters and disseizes *A*, would not *A* in pursuance of a fair contract be justified in conveying to *B*, if he was willing to receive the deed? Shall it be in the power of a wrongdoer to frustrate the honest views of *A* and *B*? *A* in this case is only a trustee of the legal title. The sale was complete before, by the bargain, and was not within the statute. * * Every contract of this kind, being out of the mischief which the statute meant to remedy, is to be considered as not within the statute." This principle was recognized and applied by this court in the recent case of *Townsend Savings Bank v. Todd*, 47 Conn., 190. The general principle is laid down by the court (p. 219,) that "a conveyance made by a trustee to the party holding the equitable title is not a sale of a pretended title." In both these cases the party conveying held only a bare legal title, both being cases of releases of a mortgage title after the mortgage had been satisfied. But it is not necessary that the grantor should hold a bare legal title. Where the grantee holds an equitable title, with something further to be done on his part to

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entitle him to a conveyance of the legal title, it is yet a case where the sale rests upon a contract made before the ouster and therefore not to be affected by it. Judge REEVE, in the remarks we have quoted, states the principle as applying to all cases of conveyances under previous contracts to sell. In this case it does not appear clearly whether the contract of Leverty with Wheeler and Sanford had been fully performed by him before McDonald asserted his right of possession against Leverty, but as the conveyance was made so soon after it is to be presumed that he had fully performed, so that the grantors were in the position of a party who held a bare legal title. We regard the point as unimportant.

It should be noticed, that while the contract of Wheeler and Sanford was to convey to Leverty "*or his assigns*," it is not found that Leverty had ever assigned his right to a deed of the premises in dispute to McDonald, while all the facts found seemed to render any such assignment improbable. The contract of Wheeler and Sanford therefore stood as one to convey to Leverty, and could be performed on their part only by a conveyance to him. They could not be affected by any controversy between Leverty and McDonald, even if it was brought fully to their knowledge. If McDonald wished to protect his rights he could at any time have brought all the parties into a court of chancery and had his rights adjudicated upon. Neglecting to do this he can not complain of a conveyance which Wheeler and Sanford were under a plain contract to make.

We conclude therefore that the deed of Wheeler and Sanford to Leverty of January 15th, 1876, conveyed a good legal title to the premises to Leverty.

Thus the matter stood until the first day of July, 1876, when Leverty made a mortgage of the premises in controversy to Harral, the plaintiff, for \$2,400, and the next question is whether the possession of McDonald was at that time such as to make the mortgage void under the statute we have been considering.

The relation of McDonald's possession to the case has

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now become entirely different from what it was when we before considered it. Then Wheeler and Sanford held the legal title and were the owners, and his possession, as we saw, could not in the circumstances be adverse to them. Now Leverty is the owner. It is true that McDonald took possession in the expectation of receiving a deed either from Wheeler and Sanford or from Leverty; but before the execution of the mortgage to Harral by Leverty a controversy had arisen between Leverty and himself with regard to the property, he had demanded a deed of Leverty who had refused to give it, and they had engaged in a personal contest for the possession of the premises. The finding is that McDonald entered into possession on the 22d of November, 1875, with the consent of Leverty, and that on the 10th of January, 1876, Leverty entered on the premises and caused the tenants of McDonald to move out, "and attempted to obtain exclusive control and possession of the tenement;" but that, while this was going on "McDonald arrived and entered on the premises and moved some of his own goods into the tenement, Leverty forbidding him to move in said goods or to remain therein;" the result being that Leverty left after locking some of the inside doors and carrying away the keys, while McDonald "continued in the occupancy of the premises, with the outside keys in his possession until April, 1881." In these circumstances it is impossible to regard McDonald as holding possession under a license from Leverty or in any other way than adversely to him, the notice to the latter of McDonald's repudiation of the license under which he originally entered, being given by the most unequivocal acts and declarations.

Regarding the possession of McDonald as sufficient therefore to make void a conveyance of the property by Leverty, under the statute, was the mortgage to Harral void? The statute invalidates all "conveyances" made by a grantor who is ousted, unless made to the person in possession. Was the mortgage such a conveyance?

It is contended by the counsel for Leverty in his brief that if it was, yet as Leverty had agreed in his contract

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with McDonald to procure a mortgage of \$2,400 for him upon the property, the latter can not now deny his right to make the mortgage in question. But the agreement was to procure a loan for McDonald's benefit, and surely this could not be regarded as authority to mortgage the property for a loan obtained for his own benefit and really in fraud of McDonald. Besides this, McDonald had twice before this demanded a deed of the premises from Leverty just as they were, which the latter had refused to give, and such a demand would be a waiver of his claim that Leverty should procure him the loan, inasmuch as the conveyance demanded would take away from Leverty the power to procure the loan on a mortgage of the property. It is clear that the mortgage can not be sustained upon this ground.

But we are satisfied that the mortgage is not to be regarded as a "conveyance" within the meaning of the statute. The precise point was decided by this court in the case of *Leonard v. Bosworth*, 4 Conn., 421. That was, it is true, a *qui tam* action to recover a penalty given by the statute, as it then stood, for receiving a deed of land of which the grantor was ousted, the deed in fact being a mortgage; but the question whether a mortgage is an alienation of the land within the meaning of the statute, was the same that would have been presented in any other case in which the question could have arisen. HOSMER, C. J., in giving the opinion of the court, all the judges concurring, says, (p. 424):—"Is a mortgage an alienation of land? The cases cited by the defendant show that it is not, and the point has frequently been decided in this court. * * * A mortgage may be considered as a lien, by means of which the mortgagee may obtain possession, and, if his debt is not paid, appropriate the thing pledged in satisfaction; but it is no alienation 'for years, life, lives or forever, or for any other term of time whatsoever.' "

The phraseology of the statute has been changed in the Revision of 1875, (which is to govern this case,) but we can not regard the change as intended to affect the meaning. It seems to have been made merely for the purpose of con-

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densation. As it stood before the revision the conveyances invalidated by it were "all bargains, sales, leases, or alienations for years, life, lives, or forever, or for any other term or time whatsoever, of any lands, tenements or hereditaments." In the revision it is simply "all conveyances and leases for any term of lands or tenements." The only point of difference as to which any question can arise is in the substitution of the word "conveyances" in the revision for "bargains, sales or alienations" in the old statute. But as it would have been easy for the revisers, if any change had been intended, to use language that would have been decisive of such an intent, and as other changes were made in it which evidently were made solely for the purpose of condensation, we must conclude that no change of meaning was intended.

The case of *Leonard v. Bosworth* is strongly supported by that of *Bates v. Coe*, 10 Conn., 280. The question there was whether a mortgage was within the statute of 1828, making void "conveyances and assignments" made by persons in failing circumstances with a view to insolvency. DAGGETT, C. J., giving the opinion of the court, says, (p. 294):—"The prohibition is of conveyances and assignments. But surely a mortgage is not an assignment, for that passes the whole interest in the thing assigned; whereas a mortgage creates only a lien in favor of the mortgagee. Nor is it a *conveyance*, within the meaning of that term as it has been understood by jurists in New York, Massachusetts, Maine and Connecticut for the last thirty years, and by English judges for the last half century." After citing a great number of cases from the English decisions and from those of the states named, and among them that of *Leonard v. Bosworth*, the judge adds:—"The result of all these cases is, that a mortgage is not a conveyance of the land, but a charge or lien upon it; and that the mortgagee's interest is a chattel; and that he is vested with the right to maintain ejectment to obtain and appropriate the pledge."

In *Clark v. Beach*, 6 Conn., 158, HOSMER, C. J., (dissenting, but not disputed on this point, and quoted approvingly

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by DAGGETT, C. J., in the foregoing opinion,) says:—“Nothing is *conveyed* to the mortgagee; the equity of redemption alone is an estate in the land. The mortgage was intended as a security only, not as a sale.” In *City of Norwich v. Hubbard*, 22 Conn., 587, CHURCH, C. J., giving the opinion of the court, says:—“A mortgagee has only a lien, and can not be considered as owner of the mortgaged estate.” In *Mills v. Shepard*, 30 Conn., 101, ELLSWORTH, J., giving the opinion of the court, says:—“The doctrine that a mortgagee of land is not the *owner* of it by virtue of his mortgage deed, has been too often held by this court and elsewhere to admit of a question in the mind of any respectable jurist. He obtains a lien upon the land, that is all. He is never spoken of as owner; nor is he such even in a technical sense until he has obtained a foreclosure.” This principle was applied, in the case of *Whiting v. City of New Haven*, 45 Conn., 308, in giving a construction to the term “owner of land,” under a provision of the charter of the city requiring notice, and afterwards compensation, to the owner of land taken for a public improvement, the court holding that a mortgagee was not to be regarded as the owner, but the person owning the equity of redemption.

It has been held in numerous cases that a mortgage of insured property is not an *alienation* of it within the meaning of a provision in a charter or policy making the policy void if the property is “alienated by sale or otherwise.” *Jackson v. Massachusetts Mutual Fire Ins. Co.*, 28 Pick., 418; *Rice v. Tower*, 1 Gray, 426; *Rollins v. Columbian Ins. Co.*, 5 Foster, 204; *Pollard v. Somerset Mutual Ins. Co.*, 42 Maine, 225; *Conover v. Mutual Ins. Co. of Albany*, 3 Denio, 254.

Were the question entirely a new one we should not regard it as free from difficulty. It is manifest that the statute can easily be evaded under the cover of a mortgage. In *Gunn v. Scovil*, 4 Day, 241, which we have before referred to upon another point, REEVE, J., in giving the opinion of the court, in the course of an illustration of a

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point that he is stating, says:—"The case put supposes the mortgagor to be in possession at the time he mortgaged; *for if he was then ousted his deed would be void.*" And HOSMER, C. J., in giving the opinion in *Leonard v. Bosworth*, 4 Conn., 421, in which he holds that a mortgage is not an alienation within the meaning of the statute, remarks that "mortgages are within the mischief at which the statute is aimed," but that they "are not within the literal construction of the act." We regard the question however as settled by the former decisions of our own court, while on the whole the weight of considerations, in view of the peculiar character of the interest of the mortgagee, is in favor of a construction of the statute which takes mortgages out of its operation.

If we are right in the views we have thus far taken there was no error in the judgment of the court below, holding the mortgage of Leverty to the plaintiff valid, and decreeing a foreclosure unless the mortgage debt was paid by McDonald or other of the respondents interested.

But the counsel for McDonald, in his assignment of errors, and in his brief, claims sundry minor errors to have gone into the judgment, which it becomes necessary for us to consider.

One of these is that his motion that Wheeler and Sanford should be cited in as co-defendants should have been allowed; and another that the committee should have heard evidence upon the question of a fraudulent combination between Wheeler and Leverty to withhold from him the title to the property and vest it in Leverty. We will consider these two claims of error together.

The object of bringing in Wheeler and Sanford, and of the evidence as to a fraudulent conspiracy to withhold from McDonald the title, was mainly to procure the setting aside of the deed of Wheeler and Sanford to Leverty, and the vesting of the title in McDonald. A further claim is made in this connection which we will consider later.

It is obvious that if Wheeler and Sanford had been brought in, and evidence of the fraud had been received

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and upon it the court had set aside the deed to Leverty, it could not have affected the mortgage held by the plaintiff. The deed to Leverty would not have been void, like a deed by a grantor who is ousted of possession, but would merely have been liable to be set aside by a court of equity, and if McDonald had in season procured an injunction against a conveyance or mortgage of the property by Leverty, or had brought a bill in equity against him to set aside his deed, the way would have been open for him to obtain the relief which he sought and to which he would on the facts claimed have been clearly entitled. But he took no such measures, but left the record title standing unquestioned and undisturbed in Leverty until the latter, in July, 1876, made the mortgage to the plaintiff. An attempt is made to impeach the mortgage by showing that the plaintiff did not inquire into the matter and learn of McDonald's possession and of his claim of equitable rights. But he was not bound to inquire further than after the record title. If an equity existed in McDonald it was for him to give notice of it to the plaintiff or to make sure that he had notice. There was nothing on the public records to suggest an inquiry into the matter. And the finding of the committee is explicit as to his want of knowledge. It is that he "loaned said money and took said mortgage without knowledge of any claim of McDonald on the property, and his occupation thereof, and in good faith, supposing that Leverty had the undisputed title and possession, but without inquiring who was in possession."

The plaintiff therefore obtained a valid mortgage lien upon the property, and if the court had found and given full effect to the fraudulent conduct claimed on the part of Wheeler, Sanford and Leverty, it would not have set aside the mortgage to the plaintiff, but would merely have given McDonald the title subject to that mortgage. McDonald therefore is not injured in being compelled to redeem that mortgage, since he would have been compelled to do it in any event, it having obtained a precedence of his own equitable rights that it could not be deprived of.

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And the decree gives him precisely this. It is that "if the said McDonald shall, on or before said day [limited for redemption] pay said sums to the plaintiff, then and in that event it is ordered and decreed that * * * the title to said premises shall pass to and become vested in the said McDonald." This part of the decree is founded on the equitable right of McDonald to the premises under his contract with Leverty. This contract was admitted and becomes a part of the case, and it made wholly unnecessary an impeachment of the deed to Leverty for fraud, so long as such an impeachment of it would have resulted, as it necessarily would have done, in vesting the title in McDonald, so far as it gave him any, subject to the plaintiff's mortgage.

It is clear therefore that if the court committed any error in excluding this evidence and denying the motion to make additional parties defendant, no harm has resulted to McDonald from the error.

But McDonald further claims that he was entitled to a judgment against Leverty for damages for the fraud practiced upon him in withholding the deed to which he was entitled under his contract, and against Wheeler and Sanford also, if they were brought in as he moved to have them; and also a judgment against Leverty for six hundred dollars and interest, being the amount of the mortgage above the sum which by the contract he was to pay Leverty as the price of the premises which were to have been conveyed to him. This price by the contract was to be \$4,100, of which \$2,300 was to be applied in payment for the work done on the block by McDonald, and the balance (\$1,800) was to be paid to Leverty by McDonald in cash. By the decree McDonald, after paying the mortgage debt, will become vested with the title to the premises; but instead of paying Leverty the \$1,800 he will have been compelled to pay Harral, the mortgagee, \$2,400, (taking here no account of interest on either side.) He will thus have paid \$600 more than by the contract he was to pay. This he has been compelled to pay by the wrongful act of

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Leverty in making the mortgage. On this ground he clearly had a claim on Leverty for \$600 and interest, for which he claims that he should have had a judgment against him, as a part of the decree.

These claims are made under the provisions of the Practice Act of 1879. That act provides, in section 6, that courts may "administer legal and equitable rights and apply legal and equitable remedies, in favor of either party, in one and the same suit;" and in section 12, that "any person may be made a defendant who has or claims an interest in the controversy or any part thereof adverse to the plaintiff, or whom it is necessary, for a complete determination or settlement of any question involved therein, to make a party;" while section 7 provides that the same suit may embrace "claims, whether in contract or tort, or both, arising out of the same transaction or transactions connected with the same subject of action." The 5th section provides for counter claims, which it is reasonable to suppose were intended to embrace as wide a diversity of claims as the complaint, as follows:—"In cases where the defendant has either in law or equity, or in both, a counter-claim or right of set-off against the plaintiff's demand, he may have the benefit of any such set-offs or counter-claims by pleading the same as such in his answer and demanding judgment accordingly."

This important part of that statute has never been before this court for construction. After careful consideration we have come to the conclusion that it did not intend to give any wider range of equitable claim on the part of the defendant or defendants than that allowed by the settled chancery practice, by means of answers and cross-bills, in suits in equity; it being intended to allow such equitable defence in actions at law as well as in suits in equity, leaving the matters of set-off and recoupment, already available in actions at law, precisely where they stood before the act was passed. If this was all that was intended we are able to determine in every particular case whether a cross-suit or counter-claim, or cross-claim between co-plaintiffs or co-

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defendants, can be entertained by the court, by applying the familiar rules of equity practice.

Let us see what these rules are, so far as they apply to the question we are now considering.

Story says in his *Equity Pleadings*, § 389:—"A cross-bill, *ex vi terminorum*, implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, *touching the matters in question in the original bill*. A bill of this kind is usually brought, either (1) to obtain a discovery, &c.; or (2) to obtain full relief to all parties, *touching the matters of the original bill*." And in § 392:—"It frequently happens, and particularly if any question arises between two defendants to a bill, that the court can not make a complete decree without a cross-bill or cross-bills, to bring *every matter in dispute* completely before the court, to be litigated by proper parties and upon proper proofs. In such a case it becomes necessary for some one or more of the defendants to the original bill to file a cross-bill against the plaintiff and some or all of the other defendants in that bill, and thus to bring the *litigated points* fully before the court." And in § 396:—"Upon hearing a cause it sometimes appears that the suit already instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of all the parties. This most commonly happens where persons in opposite interests are co-defendants, so that the court cannot determine their opposite interests upon the bill already filed, and yet the determination of their interests is necessary to a complete decree upon the *subject matter of the suit*." And in § 399:—"A cross-bill, being generally considered as a defence to the original bill, or as a proceeding necessary to a complete determination of a matter already in litigation, the plaintiff is not, at least as against the plaintiff in the original bill, obliged to show any ground of equity to support the jurisdiction of the court. It is treated, in short, as a mere auxiliary suit, or as a mere dependency upon the original suit."

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In *Vanderveer v. Holcomb*, 17 N. Jer. Eq., 89, the chancellor says:—"A decree between co-defendants may be grounded on evidence *between plaintiffs and defendants*. Where a case is made between defendants by evidence arising from pleadings and proofs *between plaintiffs and defendants*, a court of equity is not only entitled to make a decree between the defendants, but it is bound to do so." In *Elliott v. Pell*, 1 Paige, 268, the chancellor says:—"It is the settled law of this court that a decree between co-defendants, grounded upon the pleadings and proofs *between the complainant and the defendants*, may be made; and it is the constant practice of the court to do so to prevent multiplicity of suits. But such decree between co-defendants, to be binding upon them, must be founded upon and connected with the *subject matter in litigation* between the complainant and one or more of the defendants."

Numerous other authorities, English and American can be cited to the same effect.

That the statute did not intend to give a wider range to equitable defences and cross-suits, is, we think, inferable from the rules of practice under it established by the judges of the Supreme and Superior Courts, under an act of the legislature which gives the rules the authority of an enactment. The seventh section of chapter 3 of these rules is as follows:—"Transactions connected with the same subject of action may include any transactions *which grew out of the subject matter in regard to which the controversy has arisen*, as, for instance, the failure of a bailee to use the goods bailed for the purpose agreed, and also an injury to them by his fault or neglect." The next section is as follows:—"Cross-complaints, *of the nature of cross-bills in equity*, touching matters *in question in the original complaint*, may be filed by the defendant in any action, whether such action be for legal or equitable relief; and additional parties may be summoned in to answer the same if necessary." And chapter 5, sec. 1, speaks of counter-claims for equitable relief as "*of the nature of cross-bills in equity*."

We are satisfied therefore that a defendant by a counter-

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claim under the statute, cannot bring in for adjudication any matter that is not so connected with the matter in controversy under the original complaint that its consideration by the court is necessary to a full determination of the rights of the parties as to such matter in controversy, or, if it is of a wholly independent character, is a claim upon the plaintiff by way of set-off, and not a claim against a co-defendant.

Under this rule can the matters which McDonald sought to bring into the present suit, and which were ruled out, be regarded as admissible?

One of these matters is a claim for damages on Leverty for his fraud in withholding from him the legal title to the premises and making the mortgage upon them which is now before the court; with a further claim that Wheeler and Sanford should be brought in as additional defendants, that he might recover damages also against them for their fraudulent combination with Leverty to keep him out of the legal title. With regard to this claim it is perfectly clear that it does not in any manner grow out of the subject matter in controversy, nor is it necessary to a full adjudication upon that subject matter. It does not touch the question whether the plaintiff is entitled to a foreclosure, nor whether McDonald has an interest in the mortgaged premises which is to be protected by the decree. And whatever claim he has upon these parties for damages is left wholly unimpaired and can be made the subject of an action at law at his pleasure.

The other matter ruled out by the court below is the claim of McDonald to a judgment against Leverty for the \$600. It is clear that he had a claim on him for that amount; and it seems to have grown out of the matter in controversy, though a judgment upon it does not seem to have been necessary to a full disposition of the real subject matter of the suit. The suit involved the questions, whether the plaintiff was entitled to the mortgage debt which he claimed, and whether a decree for a foreclosure would do injustice to any parties having an interest in the

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mortgaged premises. In other words, the matter in controversy embraced the mortgage debt and the mortgaged property as its security. It was on the ground of its including the mortgaged property that that part of the decree was made, and which is not complained of by any of the parties, which gave the legal title to the premises to McDonald on his paying the mortgaged debt—a protection of his rights in the matter requiring that the title should be so vested in him if he should redeem the property. If this had not been done he would have been compelled either to abandon the property, or to redeem it with the title remaining in Leverty and at the risk of further complication of the title by further fraudulent acts on the part of the latter. Besides which, it was for the interest of the mortgagee that McDonald should be protected in redeeming the property, as it increased his chances of the debt being paid. But a judgment against Leverty for the \$600 was in no manner necessary for the protection of McDonald's equitable interest in the property. His claim upon Leverty for this sum was in no manner prejudiced by the refusal of the court to render a judgment upon it in the present suit. He could bring an action against him at his pleasure. We think therefore it was not his right that the matter should be adjudicated upon in the present suit.

We are clear that the court committed no error in any of its rulings.

In this opinion the other judges concurred.

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Brinley v. Grou.

SUPREME COURT OF ERRORS.

HELD AT HARTFORD, FOR THE COUNTIES OF
HARTFORD, WINDHAM, LITCHFIELD,
MIDDLESEX AND TOLLAND,

ON THE FIRST TUESDAY OF MAY, 1882.

Present,

PARK, C. J., CARPENTER, PARDEE AND LOOMIS, Js.*

GEORGE P. BRINLEY AND OTHERS, TRUSTEES, *vs.* GEORGE
GROU AND OTHERS.

A testator dying in 1866 left \$100,000 to trustees to be invested and held for his four children equally during their lives, the "rents, dividends, increase and income thereof" to be paid to them annually. The testator owned at his death a large number of shares of a fire insurance company, which went to the trustees as a part of the trust fund at a valuation of \$194 per share. The assets of the company then largely exceeded its liabilities. In 1881 the capital of the company was \$3,000,000, and its accumulated profits \$3,000,000; and the market value of its stock was \$232 per share. During that year it increased its capital from three to four millions, apportioning the new shares *pro rata* among the stockholders at \$100 per share, the trustees becoming entitled to subscribe for eighty-one shares. The new stock was at once at a large premium and the trustees sold the right to subscribe for thirty-four shares for a sum which enabled them to subscribe and pay for forty-seven shares. After the new stock was issued the dividends on the whole stock were considerably smaller. Held that the right to subscribe for the new shares, the profit on a sale of the right, and the new shares taken, went to the

* Judge GRANGER, being occupied with the trial of a long criminal case in the Superior Court, was not present at any time during the term. His place was supplied by Judge BEARDSLEY of the Superior Court in the first five cases.

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trustees as a part of the principal of the fund and not to the children as a part of the income.

And held that the term "increase," in the provision of the will that the "rents, dividends, increase and income" of the fund should be paid to the children annually, was not to be construed, so far as it applied to this part of the fund, as meaning anything more than dividends.

And that it was not enough to vary this construction that the insurance company had in the testator's lifetime on three occasions increased its capital, and that he might have foreseen that it would do so again.

CIVIL SUIT for advice as to the construction of the will of John Grou and the duty of the plaintiffs as trustees under it; brought to the Superior Court in Hartford County, and, upon an agreement as to the facts, reserved for the advice of this court. The case is sufficiently stated in the opinion.

W. Hamersley, for the plaintiffs.

C. E. Perkins, for T. J. Vail, one of the defendants.

1. The words "rents, dividends, increase and income," have as used in the will substantially the same meaning. *Hyatt v. Allen*, 56 N. York, 553.

2. Assuming that they mean the same thing, the new stock does not go to the children under that provision, but the right to subscribe for it belongs to the trustees as holders of the original stock. It is not the case of a stock dividend, when, instead of paying profits in cash, they are capitalized and turned into additional stock. There are conflicting decisions as to the rule of law applicable to such cases, although, with the exception of Pennsylvania, I believe it is held everywhere that cash dividends go to the tenants for life, and stock dividends to the remainder-man. See Perry on Trusts, § 545 and note; *Minot v. Paine*, 99 Mass., 101; *Leland v. Hayden*, 102 id., 542. Whatever might be the rule applicable there, this case is entirely different, both in fact and in principle. This was new stock, for which the subscriber paid in cash, his advantage being merely in the value being greater than the amount that had to be paid. But the claim on the other side is, that this difference in

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value represented a surplus which was the product of the old stock and might have gone into dividends to which the children would have been entitled, and that they are therefore entitled to the benefit of this surplus in the form in which it was distributed among the stockholders. But a stockholder is never entitled individually to a share of the surplus in such a case until it has been set apart as a dividend, and much less would a tenant for life be, the latter having no claim upon the stock itself, however its value may be increased by the surplus, but only upon the dividends when separated from it. Besides this, the mere surplus, in a case like this, does not give the whole value to the stock beyond par. The organization of the company, its vast and complete system of agencies, its great reputation, its long existence and credit, have much to do in giving value to its stock. It is well settled in this state, as well as elsewhere, that the surplus as well as the capital is a part of the stock itself, and belongs solely to the corporation until it is separated and declared as a dividend. *Phelps v. Farmers & Mechanics Bank*, 26 Conn., 272; *Hyatt v. Allen*, 56 N. Y., 553; *Williston v. Michigan &c. R. R. Co.*, 13 Allen, 400; *March v. Eastern R. R. Co.*, 43 N. Hamp., 515. The surplus of this company, the day before the increase, was the property of the estate as much as the capital. Nothing was added to it by the increase, and the day after it still belonged to the estate just as it did the day before. The only difference was that each share of stock had a smaller share of the surplus connected with it than it had before. There was nothing in the transaction of increase of the capital stock which changed the amount or nature of the surplus, or the respective rights of the life-tenant and the remainder-men in it.

This precise question, it is believed, has arisen in only two cases. In *Akins v. Albree*, 12 Allen, 359, it was held in just such a case that the new stock was a part of the principal and went to the remainder-man. In *Moss's Appeal*, 88 Penn. St., 264, the Supreme Court of Pennsylvania, in a case exactly like this, held the same way.

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Whatever may be said of the rule applicable to stock dividends, or the decisions on that subject, no court of superior or inferior jurisdiction has, it is believed, ever held that in a case of this sort the tenant for life took any interest in the additional stock.

G. Collier and R. Welles, for *G. Grou, W. D. Grou and Mary J. Vail*, defendants.

1. If the word *increase* was used by the testator in its natural, usual and primary sense, it is clear that the new stock belongs to those having the life use, and this is the construction that should be given to the language of a will. *Allyn v. Mather*, 9 Conn., 125; *Gold v. Judson*, 21 id., 625.

2. But if it be claimed that ordinarily the words *rents*, *dividends*, *increase* and *income* would be construed as synonymous, reference may be had to the situation of the testator's property to raise a latent ambiguity as to *increase*. *Brainerd v. Cowdrey*, 16 Conn., 11; *Ayers v. Weed*, id., 802; *Bond's Appeal from Probate*, 81 id., 190. The fact appears that the stock of the insurance company had been in possession of the testator for many years, and that, while he possessed it, three several times the stock had been *increased* by the same process as that by which the last increase was made; and it is altogether probable that he had this same stock in view when he directed that the property should remain invested as invested by him. The fair and natural inference is that the testator had in his mind the circumstances under which the stock had *increased* while in his possession, and that he used the word *increase* in order to describe a future apportionment of new stock. He could have used no other word so aptly to describe the fact.

3. But the testator's children are entitled to the new stock under the proper construction of the other words used, or as *rents*, *dividends*, and *income*. It is assumed that if the new stock had been issued without the payment to the company of anything—if the new stock had only represented accumulated profits, and the market

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value of the stock had been reduced *pro tanto*, as it theoretically should have been by such a stock dividend, then the new stock would have belonged to those given the life use as income and dividend. This is the modern American doctrine, and the tendency of the late English cases is in the same direction. The leading case in this country is *Earp's Appeal*, 28 Penn. St., 368. The testator bequeathed to his four children, *the rents, income and interest* of certain stocks. It was held that the accumulations of stock after the death of the testator was *income*. The court say:—“The omission to distribute it semi-annually, as it accumulated, makes no change in its ownership. The distribution of it among the stockholders in the form of new certificates, has no effect whatever upon the equitable right to it.” In an elaborate opinion the early English cases are reviewed and disapproved. This case was followed in New York with approval in the case of *Clarkson v. Clarkson*, 18 Barb., 649. The testator left two shares of his estate to trustees “to pay the *interest, dividends and increase*” to his two daughters, for the term of their natural lives. It was similar to the present case in this—that the testator bequeathed a *definite portion of his estate* in trust, and not stocks *eo nomine*. The court say, (p. 651),—“There is nothing in this clause of the will expressly requiring the capital of these two shares to be increased by accumulations arising from the proceeds of the shares themselves; neither is there anything from which such an intention can be inferred, while there is much tending to the conclusion that the testator intended that all the profits and income of every kind and nature whatsoever, arising from these two shares, however invested, should go to the use and benefit of his two daughters. * * ‘Dividends,’ as used in the will, is unqualified; it includes in its technical sense, as well as in its ordinary and common acceptation, all distributions to corporators of the profits of the corporation, whether such distributions are large or small; or whether made at long or short intervals; and without any regard to the manner or place of their declaration or mode of payment.” The early

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English cases are disapproved. Even Lord ELDON, in *Paris v. Paris*, 10 Ves., 185, says:—"As to the distinction taken between stock and money, it is *too thin*." This doctrine was further followed in New York in the case of *Simpson v. Moore*, 80 Barb., 637. A bank charter had expired, and the bank re-organized under the general banking law, but made a dividend of eighteen per cent., which the trustee elected to take in stock in the new bank. Held that as part of the dividend was held as capital when the stock was purchased, the original investment must be preserved, and the residue paid to the life-tenant. In *Van Doren v. Olden*, 19 N. Jer. Eq., 176, the English and American cases are reviewed, and *Earp's Appeal* and the New York cases are approved as announcing correct principles in preference to the early English cases. In *Wiltbank's Appeal*, 64 Penn. St., 256, the doctrine of the above cases was carried to its legitimate conclusion as we claim it. A testatrix gave her estate in trust to pay her daughter \$1,400 annually from the income, and the remainder of the income to her son. Part of the trust fund was stock in two corporations, one of which ordered an increase of stock, to be distributed to the old stockholders on payment of \$75 per share. The trustee sold the privilege to subscribe. The other made a similar order. The trustee advanced money, subscribed for the stock, sold it at an advance, and carried what was received in both cases to the trust account. Held that these items were income and not capital. In the still later case of *Lord v. Brooks*, 52 N. Hamp., 72, the foregoing decisions are cited with approval, while the English and Massachusetts decisions are said to be unsatisfactory. The court, (p. 85,) express some doubt whether a corporation has the legal power to capitalize earnings so as to divert income from the life tenant to the remainder-man, especially where the surplus is simply kept to protect the capital, and is not actually appropriated and expended on the principal, as in the erection of buildings, etc. See also *Pratt v. Pratt*, 33 Conn., 446. We insist that there is no difference in principle between a stock dividend pure and simple and this

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increase of one-fourth new stock which has taken away one-fourth of the former surplus and earnings, which one-fourth if put into a dividend would have belonged to the life-tenants, but is now in the hands of the trustees. That the \$3,000,000 surplus of undivided profits equitably belonged to the stockholders, and in this case to the parties having the life use, has been practically decided in this state. In *State v. Phœnix Bank*, 34 Conn., 239, BUTLER, J., says:—“The accumulation of the surplus was not an essential part of the business of the bank. It was organized upon the idea that its earnings would be divided as earned, and a court of equity would have compelled a division of them if unjustly accumulated and withheld, for every stockholder, qualified or absolute, became an equitable owner in the earnings as soon as earned, and entitled to an equal share in and a reasonable division of them.” See also *Beers v. Bridgeport Spring Co.*, 42 Conn., 17. In the earlier case of *Phelps v. Farmers & Mechanics Bank*, 26 Conn., 269, ELLSWORTH, J., (p. 272,) says:—“If a bank has a certain defined surplus, which has actually been separated and made distinct, and is so known and treated by contracting parties or by the statute, it is possible it may, in that case, be held to possess a new character and be dealt with accordingly.” It was held in this case that the *undeclared* profits were mere increment of the stock; but in the recent case of *Vail v. Vail*, 49 Conn., 52, LOOMIS, J., in commenting upon that case, says:—“But suppose a life estate had been created in the stock by contract or bequest, is it not too obvious for argument that the court never would have held that the profits were a mere augmentation of the stock, and that the dividends out of the surplus fund must pass into the hands of the owner of the stock itself, in defiance of the terms of the contract or bequest. ELLSWORTH, J., by anticipation guards against any such misapplication of the principle by recognizing the fact that it would be possible by contract or otherwise to impress a different character on the profits, which might in legal effect separate them from the stock.” And it was held that the bequest to Mrs. Vail

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did have the effect to separate the profits from the stock in advance and to vest them in her husband as trustee, so that the law of 1878 could not affect those thereafter earned. So that the equitable rights of these life-tenants attached to these earnings and became vested when the will became operative, and these rights cannot be affected by the legislature, the company, or the trustees. But twenty-five per cent. of these earnings have been in fact diverted from the old stock, and put by these trustees into new, and if the new stock does not belong to the life-tenants then they have lost just so much of their own.

4. It is no objection to this view that the value of the stock declined after the new issue. It declined no more than if a dividend of twenty-five per cent. had been declared, as already shown. The stock doubtless increased in value because of the proposed increase of stock. It is no reason why our property should be wholly confiscated because somebody else may sustain a small loss. The intent of the testator should be carried out even if the value of the capital should be diminished. *Balch v. Hallet*, 10 Gray, 403.

PARDEE, J. John Grou died in 1866, leaving a will containing the following clause:—"I give, devise and bequeath to George Brinley, Oliver G. Terry and William J. Hamersley, and their successors in office, the sum of one hundred thousand dollars, to have and to hold the same upon the trust and confidence following: that is to say, they shall invest and hold the same for the use and benefit of my four children, John Grou, Jr., George Grou, Mary J. Vail, and William D. Grou, during their natural lives, and shall pay to them equally the rents, dividends, increase and income thereof annually, after deducting the expenses of said trust, one-fourth to each during his or her life. If any of my children should die leaving issue living at their decease, his share or her share shall then be transferred to said children free from said trust; but if any should die leaving no children, the same shall be held in trust for the use and

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benefit of the survivors; and if all die without issue, then the estate is to go to my legal heirs."

The testator at the time of his death was the owner of three hundred and thirty-three shares of the stock of the *Ætna Insurance Company*; of these shares two hundred and forty-four became a part of the fund then created at a valuation of \$194 per share. The assets of the company then exceeded its liabilities to the amount of about \$355,000. In 1881 the capital of the company was \$3,000,000; its accumulated profits \$8,000,000; and the market value of a share was \$282. In that year it increased its capital from \$3,000,000 to \$4,000,000, apportioning the ten thousand new shares *pro rata* among the stockholders, they paying in \$100 per share. The trustees thereby acquired the right to subscribe for eighty-one and one third shares; they sold the right to subscribe for thirty-four and one third shares, receiving therefor \$4,859.50; and of this sum they applied \$4,700 to payment for forty-seven shares. After the increase the market value of a share was \$282; in February, 1882, the date of this complaint, it was \$285. The dividend for the year preceding the increase was twenty per cent; for the year succeeding, sixteen per cent.

The plaintiffs, "the trustees under the will, allege that George Grou, William D. Grou and Mary J. Vail (John Grou, Jr., having died without issue and they taking his interest as survivors,) claim to be entitled to receive these forty-seven shares of new stock in the proportion to which they are entitled to the annual rents, dividends, increase and income of the trust fund, and that it should be transferred to them; and that Thomas J. Vail, husband of Mary J. Vail, claims that these forty-seven shares are, and should remain, a part of the capital of the fund.

The trustees ask the Superior Court to determine the following questions:—

1st. Whether the legal effect of the provisions of the trust in the will is such as to entitle the *cestuis que trust* to the right to subscribe to the new stock.

2d. Whether the provisions of the trust require the

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plaintiffs to hold as a part of the trust fund the new stock so purchased by them, or to divide the same among the *cestuis que trust*, as a part of the rents, dividends, increase and income of the trust fund.

8d. Whether the *cestuis que trust* are entitled, as a part of the rents, dividends, increase and income of the trust fund, to subscribe for any portion of the new stock, or are entitled to any proportion of the profits that may arise from the purchase and sale of the new stock, or to any proportional part of the market value of the right to subscribe for such new stock at the time such subscriptions are made.

4th. In the event that the trust entitles the *cestuis que trust* to receive as annual rents, dividends, increase and income, any share of the benefit accruing to the trust fund by reason of the increase of stock by the *Aetna* Insurance Company, in what proportion does the benefit go to the *cestuis que trust*?

The Superior Court has asked the advice of this court upon these questions.

A shareholder has no proprietary interest in the accumulated profits properly retained by a corporation for the protection of its capital; he cannot acquire one by summoning it to make a rest in its business and take an account of them; he first obtains one when it has either in fact, form or intent set his proportion thereof as a dividend to his individual credit. This, of course, is the measure of the right of a life tenant; there is to him only a possibility that the profits may be divided, or that the use of them by the corporation may increase its dividend during his term.

In the case before us, neither in fact nor form did the corporation make any division, or part with any portion of its earnings in behalf of the stockholders. On the contrary it manifestly desired to retain its surplus intact and increase its strength by the addition of a million of dollars to its capital; its accumulated earnings all remained its property and subject to the risks of its business. It offered to the shareholders the privilege of paying in this sum; investors were of the opinion that this privilege was worth a premium;

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not because it carried with it the right then or ever to demand any portion of the surplus retained in good faith by the company, but presumably because they believed that from the income from its capital, surplus, and business, it would make regular dividends largely in excess of the ordinary rate of interest.

The increase in market value above cost of the shares constituting the capital of this fund, resulting either from an accumulation of profits by the corporation or from its vote to permit each one of its proprietors to purchase a fraction of a new share because he was the owner of an existing one, belonged to and formed a constituent part of this last, and of course of the capital. If the trustees had sold the existing share, and thereby had realized the increased value resulting from either of the mentioned causes, the entire proceeds of the sale would have still formed a part of the capital; and the excess in market value above cost of the right to purchase such fraction also belongs to and forms a constituent part of the existing share and of course of the capital; and when the trustees realized this excess by a sale of the privilege, the proceeds remained a part of that capital. In short, all of the increase of value which is realized from the act of the trustees in selling either the existing share with the privilege annexed, or the privilege severed therefrom, belongs to the capital; purchasers pay it from their money; all that is realized from the act of the corporation in making dividends belongs to the life tenant. *Atkins v. Albree*, 12 Allen, 359; *Moss's Appeal*, 88 Penn. St., 264. And this regardless of the question whether profits were accumulated before or after the purchase of shares by the trustee; if before, and a dividend is made immediately after, it is the good fortune and the property of the life tenant; if after, and the corporation does not divide them during the life tenancy, it is the advantage of the remainder-man. Each must take the risk of his time, both as to the success of the business and as to the action of the directors in the matter of dividends.

Again, it is said that the will, which is the law of the

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case, requires the transfer of these forty shares to the life tenants, by the requirement that the trustees shall annually pay to them "the rents, dividends, increase and income" of the trust fund; that in the life of the testator the company had on three occasions increased its capital; that he foresaw that it would do so again; and that the word "increase" points to such an event. But, looking at the whole instrument, we are unable to find therein expressed any other intention in reference to that part of the fund invested in *Ætna* Insurance stock, than that his children should receive all that the company should actually separate from its funds and set to the trustees as dividends thereon.

The Superior Court is advised that the forty-seven shares paid for are a part of the principal of the fund; to be retained by the trustees as such.

In this opinion the other judges concurred.

HORACE A. WILCOX *vs.* BENJAMIN A. GLADWIN.

The statute with regard to tax warrants (Gen. Statutes, p. 165,) provides that they "may be in the following form." The form then given, after directing the officer to demand the several taxes of the several persons named in the tax list, proceeds as follows:—"And if any person fails to pay his proportion of said tax you are to levy upon his goods and chattels, * * and for want of such goods and chattels you are to levy on his real estate * * or take the body of said person and commit him unto the keeper of the jail," &c. Held, in trespass against an officer for levying a tax warrant on the body of the plaintiff and committing him to prison—

1. That it was not necessary that the form given should have been followed, the statute not being imperative.
2. That the omission in the warrant of the alternative direction to levy on real estate did not make the warrant void, inasmuch as, with that provision in it, the officer would have had full power to levy on the body as he did, and it was a matter as to which the plaintiff had no election.

The officer endorsed his fees for the service of the warrant upon the original warrant which he returned to the justice, but did not endorse

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his fees on the copy which he left with the jailer. Held that the latter endorsement was not necessary.

The warrant directed the keeper of the jail, in case any person was committed upon it, to keep such person safely until he should pay the tax and the fees of the officer for service. The plaintiff claimed that the defendant's fees were excessive and illegal, and that if they were so he was liable to the plaintiff for false imprisonment. The judge charged that, if the fees were excessive, the defendant yet was not liable as a trespasser unless the jury should find that he made them so in bad faith and for the purpose of keeping the plaintiff in jail. Held to be erroneous.

The defendant had no right to hold the plaintiff in jail until he paid fees which were illegal.

TRESPASS for false imprisonment; brought to the Superior Court in Middlesex County, and tried to the jury before *Sanford, J.* The defendant pleaded a general denial, with notice of a justification under a tax warrant as a tax collector.

Upon the trial, the imprisonment of the plaintiff being admitted, the defendant offered in evidence the following tax warrant:—

“To Benjamin A. Gladwin, Collector of the town of Essex, in the county of Middlesex,—Greeting:

“By authority of the State of Connecticut, you are hereby commanded forthwith to levy and collect of each of the persons named in the annexed list herewith committed to you, his several proportion of the sum total of said list as therein stated, being a tax agreed upon by the inhabitants of said town, regularly assembled on the 2d day of October, A. D., 1876, for the purpose of paying the current expenses of the town for the coming year; and if any person shall neglect to make payment of the sum at which he is assessed and set in said list, you are to distrain the goods or chattels of such person and dispose of the same as the law directs, and after satisfying the said tax and charges you are to return the overplus, if any, to said person; and for want of goods or chattels on which to make distraint, you are to take the body of the person so neglecting and him commit unto the keeper of the jail in said county, within the prison, who is hereby commanded to receive and safely keep him

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until he shall pay the sum, together with your fees. Dated at Essex, this 20th day of February, 1877.

GILES POTTER,
Justice of the Peace."

"In compliance with the above warrant, which I assert to be a true copy, I herewith commit the body of Horace A. Wilcox, who is in the annexed tax-list, for non-payment of taxes due the said town of Essex, to the keeper of the jail in said county of Middlesex, for safe keeping in the form the law directs. Essex, May 27th, 1878.

Attest, B. A. GLADWIN, *Tax Collector."*

The plaintiff objected to this evidence upon the ground that it was not a legal warrant, inasmuch as there was no authority given in the same to the defendant, as collector of taxes, to levy on real estate, and was not sufficient to justify the defendant as such collector in making the arrest of the body of the plaintiff and committing him to jail. The court overruled the objection and admitted the evidence, and instructed the jury that the writing was a legal and sufficient warrant.

The plaintiff offered evidence to prove that he was possessed of real property more than sufficient to pay the tax assessed against him. The defendant offered evidence to prove that the plaintiff refused to pay his tax, (the same being a commutation tax of \$2); that he, the defendant, made several demands for the tax; that it remained unpaid for over one year after it became due; that the plaintiff neglected to show or turn out property to the collector; that after due inquiry he was unable to find any property either real or personal belonging to the plaintiff on which to levy; and that on May 28th, 1878, he levied the warrant on the body of the plaintiff and committed him to the keeper of the Haddam jail in Middlesex County, and left with him a true and attested copy of the warrant and endorsed his fees on the original warrant and returned it to the justice who issued it.

The plaintiff offered evidence to show that while he remained in jail he demanded of the jailor the amount of

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the bill of taxes and costs, that he might pay them and be discharged, and was unable to get it. The defendant offered evidence to show that no such demand was ever made by the plaintiff, and also to show that he could have ascertained the amount at any time he desired.

The defendant did not place the amount of the tax or fees on the copy of the warrant left with the jailer. The plaintiff claimed and asked the court to instruct the jury that it was the duty of the defendant to have endorsed on his copy so left with the jailer the amount of tax and his legal charges for serving the warrant, and that failing to do so he rendered himself liable in this action. The court did not so charge the jury, but did charge that the defendant was under no legal obligation to endorse the amount of the tax and fees on the copy left with the jailer, and that his neglect so to do did not make him a trespasser.

The plaintiff claimed that the fees charged by the defendant in serving the warrant were in excess of the legal fees, and asked the court to charge the jury that the defendant was liable for keeping the plaintiff in jail until he paid the fees charged.

It was not claimed by the plaintiff, nor did he offer any evidence to show, that he made any tender of the tax or of the amount he claimed to be the legal fees before he finally paid the tax and fees charged.

The court instructed the jury that if the fees charged by the defendant were in excess of the legal fees, that would not make him a trespasser and liable in this action, unless they should find that the officer made these fees excessive in bad faith and for the purpose of keeping the plaintiff in jail.

The jury returned a verdict for the defendant, and the plaintiff moved for a new trial for errors in the rulings and charge of the court.

D. Chadwick, in support of the motion.

W. F. Willcox, contra.

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BEARDSLEY, J. The first question in this case is as to the sufficiency of the warrant upon which the defendant relies as justifying the alleged imprisonment of the plaintiff. The plaintiff claims that it is void upon its face, by reason of the omission in it of any precept to levy upon real estate, first, because in this respect it departs from the form given by statute (Gen. Statutes, p. 165, sec. 21,); and second, because by reason of such omission the defendant in this case was deprived of the election which he might otherwise have exercised to levy upon the real estate instead of the body of the plaintiff. We do not think that this objection to the warrant should prevail upon either ground.

It is well settled that the forms for proceeding given by statute need not be strictly pursued except in certain cases where the nature of the subject to which they relate requires a strict adherence to them, and in these cases the language of the statute prescribing the form is imperative. *Persse v. Watrous*, 30 Conn., 139. Here the language of the statute giving the form is clearly permissive,—“warrants for the collection of taxes *may* be in the following form,”—and there is no reason growing out of the nature of the proceeding why it should be copied.

Nor was the warrant defective in substance on account of the omission referred to. It still commanded the collector to do what the law would have justified him in doing if it had contained the alternative direction to take the body or real estate. In obedience to its mandate the defendant could violate no legal right of the plaintiff, because the plaintiff had no election as to the mode of levy. The defendant had such election, and if in the exercise of it he had decided to take real estate instead of the body, it would have been necessary for him to procure another warrant giving him the requisite authority.

Nor did the court err in declining to charge the jury as requested by the plaintiff, “that it was the duty of the defendant to have endorsed on the copy of his warrant left with the jailer the amount of the tax and his legal charges for serving the warrant.”

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The only statutory direction in respect to the details of the service of tax warrants, is that tax collectors are to proceed in the same manner as officers in the levy of executions. Upon the levy of an execution upon the body the officer is only required to leave with the jailer a true and attested copy of the execution. The amount of the judgment would necessarily appear upon the face of the execution. In this case the amount of the tax appears upon the "annexed list" referred to in the return of the officer, and which was presumably attached to the warrant, especially as no objection was made to the warrant in the court below for the want of such annexation. The statute nowhere requires that the officer shall endorse upon the copy left with the jailer the amount of his fees.

The remaining question in the case is as to the correctness of the charge of the judge responsive to the claim of the plaintiff that the fees charged by the defendant for serving the warrant were excessive and his request for a charge that the defendant was liable for keeping the plaintiff in jail until he paid such fees.

The plaintiff having proved his imprisonment as alleged, was entitled to a verdict, unless the defendant proved a legal justification for such imprisonment. For the purpose of making such proof the defendant introduced in evidence his tax-warrant with his endorsement of fees upon it, coupled with evidence that upon the service of the warrant upon the plaintiff he had made such endorsement of fees upon it, and returned it to the magistrate who issued it. The plaintiff claimed that the fees so endorsed upon the warrant were excessive, and asked the court to charge the jury that the defendant was liable for keeping the plaintiff in jail until he paid such fees. The court charged the jury that if the fees charged by the defendant were excessive, that would not make him a trespasser and liable in this action, unless they should find that the defendant made those fees excessive in bad faith and for the purpose of keeping the plaintiff in jail. We are of opinion that this charge was erroneous.

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The only condition upon which the defendant was justified in imprisoning the plaintiff, was his delinquency in the payment of the tax assessed against him and the legal fees of the collector; and the only object of such imprisonment recognized by law, was to coerce payment of the amount thus made up. If the plaintiff was unable to pay this amount he was entitled to be discharged upon taking the oath provided by law. The official endorsement made by the defendant upon the tax-warrant was in the nature of a declaration of the cause of the plaintiff's imprisonment. He thereby, in effect, certified that he had imprisoned the plaintiff by reason of his non-payment of an amount of which the fees so endorsed formed an integral part, and to coerce the payment of such amount.

If such fees so claimed by the defendant were excessive and therefore illegal, might not the plaintiff properly claim that the defendant had abused the authority given him by the warrant, by imprisoning him for the non-payment of money which he had no right to demand. Such in substance we understand to have been the claim of the plaintiff, though in his request for instructions to the jury he uses the language, "for keeping the plaintiff in jail until he paid such fees." But if the original imprisonment was illegal every continuation of it was a new trespass for which the defendant was liable. *Leland v. Marsh*, 16 Mass., 389; *Lambert v. Hodgson*, 1 Bing., 317.

By the charge of the court the jury were precluded from all but a single inquiry, and were required to find a verdict for the defendant, although the defendant's charges may have been grossly excessive, made with mercenary and corrupt motives, and the plaintiff may have been imprisoned by him to enforce this payment, unless they were also made "in bad faith and for the purpose of keeping the plaintiff in jail," presumably by so swelling the sum which he was to pay for his release as to place it beyond his power to effect it. We think that the charge of the court upon this part of the case should have been such as to authorize the jury to render a verdict for the plaintiff if they found that the

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fees charged by the defendant were illegal and that the plaintiff was imprisoned by him to compel the payment of an amount of which such illegal fees formed a part.

A new trial is advised.

In this opinion the other judges concurred.

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TOWN OF CLINTON *vs.* TOWN OF HADDAM.

A party is not estopped by an admission made in ignorance of his rights, induced by an innocent mistake of material facts.

The selectmen of the town of *H* received notice from the selectmen of the town of *C* that a pauper belonging to the former town was on expense in the latter town. The selectmen of *H*, believing that the pauper in fact belonged to their town, wrote the selectmen of *C*, requesting them to be as economical as possible in the matter and promising to pay for the supplies. The supplies were however paid for by a relative. Four years later, the pauper again needing aid from the town, the selectmen of *H* were duly notified of the fact and the supplies were furnished by the town of *C*. While they were being furnished the selectmen of *H* still believed that the pauper belonged to *H*, and conceded this to the selectmen of *C*, who by reason of it took no steps to investigate the matter or to hold any other town responsible. The means of knowledge were however equally open to both parties. In a suit brought by the town of *C* against the town of *H* for the supplies last furnished, it was held that the defendants were not estopped from showing that the pauper was not settled in *H*.

ASSUMPSIT for supplies furnished a pauper; brought to the Superior Court in Middlesex County. Facts found by a committee and case reserved for advice. The case is sufficiently stated in the opinion.

L. E. Stanton and W. F. Willcox, for the plaintiffs.

D. Chadwick, for the defendants.

LOOMIS, J. This action was brought to recover for supplies furnished one Henry T. Taylor, an alleged pauper belonging to the defendant town.

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The argument for the plaintiff is two-fold—that the pauper in fact had a legal settlement in the defendant town, and, if not, that the defendant is estopped to deny the settlement by reason of certain concessions made by its selectmen.

The facts reported by the committee effectually dispose of the first claim. It was distinctly conceded by the plaintiff that the pauper had no settlement in the town of Haddam unless it was derived from his father, Warren Taylor, and that the settlement of the latter in Haddam must be predicated wholly upon a continuous residence in that town for six years commencing in the year 1854. But the committee finds that in the spring of 1859 Warren Taylor removed from Haddam to Camden in the state of New Jersey with his wife, where he resided until the fall of 1861, and that in so removing he did not contemplate a temporary absence but a change of residence. The evidential facts bearing upon the question of residence, reported by the committee, and urged again before this court, spent their force before the former tribunal and resulted in a finding adverse to the plaintiff, which it is not within our province to review or reverse.

The only question left for our discussion is, whether an estoppel against the defendant can be predicated upon the following facts:—In February, 1870, the wife and children of the pauper, then residing in Clinton, became reduced to want, and they were supported by the plaintiff until April, 1870, having given notice to the selectmen of the defendant town as required. After receiving the notice the latter wrote to the selectmen of Clinton asking them to be as economical as they could be, and promising to pay for the supplies. Payment however was made by Warren Taylor and not by the defendant. After an interval of more than four years, in October, 1874, the pauper and his family, still residing in Clinton, were again reduced to want, and again supplied by the plaintiff after the usual legal notice to the selectmen of Haddam. Warren Taylor repeatedly offered to pay for these supplies from his own funds, but the select-

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men of Clinton refused to receive payment either from him or the pauper, who had also offered to pay by request of his father. The selectmen of Haddam refused to pay this bill for the reason that Warren Taylor and Henry T. Taylor had both offered to pay and had been refused.'

In regard to the other item in the plaintiff's bill of particulars, for the supplies furnished in 1878, there are no facts reported except the furnishing of supplies and the notice. But there is a further general finding that "from 1870 until after the commencement of this suit the selectmen of Haddam in good faith believed and conceded that said Henry T. Taylor had a settlement in Haddam. By reason of that concession the selectmen of Clinton took no steps to ascertain where he belonged, but furnished the supplies relying upon the liability of Haddam to reimburse them. And they did not know that Haddam denied his settlement in that town until this case was reached for trial in the Superior Court."

Assuming for the purposes of this discussion that the concessions of the selectmen are to have the same force as if they were defendants instead of the town, we think there are wanting some essential elements to constitute an estoppel.

The genius and policy of the law favors full investigation of the truth. The doctrine of estoppel often operates to exclude the truth, and is therefore not to be favored. It is an exception to the general rules of law, and was introduced as such for the prevention of fraud and wrong. In other words, the object of an estoppel is to prevent a party from founding a right upon a wrong, and it is properly applied to a case where it appears that a party has wrongfully said or done anything for his own advantage with the design to influence, and which did actually influence, the action of the other party to his detriment.

It appears that the selectmen of Haddam honestly believed that the legal settlement of the pauper was in their town, and what they honestly believed they would not dishonestly conceal. They were however innocently

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mistaken as to the fact of Warren Taylor's continuous residence in the town, and are not to be blamed for their ignorance. A reference to the finding will show that the records of the town furnished very strong evidence that Warren Taylor's residence was continued in Haddam during the period in question. The selectmen of Clinton were equally mistaken; but the means of knowledge were equally open to them as to the selectmen of Haddam. Now it seems to us a most flagrant abuse of the doctrine of estoppel to apply it to such a case as is here presented. We think no party should be estopped by an admission made in ignorance of his rights induced by an innocent mistake of material facts, especially when, as in this case, the means of knowledge were equally open to the other party.

Again. We do not think it clearly appears that any detriment to the plaintiff was occasioned by the concessions made by the selectmen of the defendant town. Had they kept silent when notified, or denied all liability, no reason for such a course could have been given, for, as the facts were then understood, the evidence was decisively against them. It is highly probable the plaintiff would have instituted a suit just as soon without the concessions as with. When the plaintiff knew of the additional facts the suit was prosecuted to final judgment notwithstanding, and not without good reason, for the evidential facts reported show that it must have remained doubtful to the last, and the committee states that the issue was found upon the mere preponderance of the evidence. It seems therefore too improbable for belief that the concessions referred to occasioned any appreciable injury to the plaintiff. We do not care however to pursue this subject, or to place our decision upon this ground, as the position first taken is ample to dispose of the case, and in that we derive strong confirmation from the decisions of the highest courts in other states.

In *Brewer v. Boston & Worcester R. R. Co.*, 5 Met., 478, the adjoining proprietors of lands agreed by parol on a dividing line, intending to establish it as the true line, and pursuant to the agreement they entered into possession. Afterwards,

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one of the parties being about to sell to the defendants, the other stated to the purchasers that the line agreed upon was correct and that he did not own beyond it. After the sale the purchasers made improvements up to the agreed line with the knowledge of the adjoining owner, who was present and repeatedly pointed out the line. But having subsequently discovered the true line and that it extended beyond the improvements, the court held that he was entitled to recover. WILDE, J., giving the opinion, placed the decision upon the ground that the plaintiff acted fairly, under a mistake as to the true line, and that he made no declaration contrary to his honest belief at the time or with any intention to deceive; adding,—“We think it clear that declarations thus made do not operate in the nature of an estoppel.”

In *Thrall v. Lathrop*, 80 Verm., 307, REDFIELD, C. J., in giving the opinion, stated it as a well established proposition that “no party is estopped by an admission made in ignorance of his rights, induced by an innocent mistake of material facts.” The cases of *Royston v. Howie*, 15 Ala., 305, and *Smith v. Hutchinson*, 61 Misso., 88, endorse substantially the same proposition.

In *Leicester v. Rehoboth*, 4 Mass., 180, it was held that where a town in which a pauper is supposed to have his legal settlement receives notice that a pauper is on expense in another town, and afterwards actually pays such expenses, it is not estopped to deny the settlement of the pauper in a suit afterwards brought for expenses afterwards incurred in the support of the same pauper by the town receiving the payment. It is quite obvious that there was no concession in the case at bar any stronger than an actual payment of the expenses first incurred would have made.

We advise judgment in favor of the defendant.

In this opinion the other judges concurred.

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STATE OF CONNECTICUT *vs.* CITY OF HARTFORD.

The property of the state within the city of Hartford can not be assessed for benefit received from the construction of a public sewer.

The charter of the city provides that the expense of public improvements may be assessed "upon the persons whose property is, in the judgment of the common council, specially benefited thereby." Held that, to make the state liable to such assessment, it was necessary that it should have been expressly mentioned or that the intention to include it should be clearly implied.

The legislature has power to make the property of the state liable to such an assessment.

APPEAL to a judge of the Court of Common Pleas of Hartford County from an assessment for a city sewer. Facts found and case reserved for advice. The case is fully stated in the opinion.

C. E. Perkins, for the State.

S. O. Prentice, for the City.

PARK, C. J. Certain real estate in the city of Hartford was mortgaged to the state to secure a loan from the School Fund, and the mortgage was afterwards foreclosed, and the title to the property became absolute in the state. After this the city of Hartford, by its proper officers, laid a sewer along the street upon which the property was situated, and assessed the state, with other holders of real estate upon the street, for the special benefit conferred by the sewer upon their property; and the sole question in the case is, whether the state is liable to such an assessment.

The city claims that it is, by virtue of the following provision of its charter:—"And whenever any public work, including dykes, shall have been lawfully laid out or altered by the court of common council, said court may assess the whole or any part of the expense of laying out, altering, and making such public work—including highways, streets,

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sidewalks, gutters, sewers, parks, public walks, openings between buildings, the establishment of building lines, sidewalks and crosswalks, draining low grounds or filling up the same—upon the persons whose property is, in the judgment of said court of common council, specially benefited thereby, and estimate the proportion of such expense which said persons shall respectively defray, and enforce the collection of the same; or may, if they deem proper, assess the expense of any such public work directly upon land benefited thereby, describing said land in said assessment by metes and bounds, and specifying the amounts assessed on each piece so described respectively; which said land, on default of payment of said assessment within six months after public notice thereof shall have been given, shall be liable to be sold for the payment of the same."

We think it clear that there is nothing here which expressly or by necessary intendment includes the state as a party on whom assessments may be made. The language is:—The court of common council may make assessments "upon the persons whose property is specially benefited, and may estimate the proportion of such expense which said persons shall respectively defray, and enforce the collection of the same." The persons described, who are liable to be assessed, are persons who can be compelled to pay, should they refuse to do so voluntarily. The state cannot be sued, and therefore cannot be compelled to pay under any circumstances. Hence the language of the charter not only does not expressly or by necessary implication include the state, but, on the contrary, by necessary implication excludes it.

In the case of *The State v. Shelton*, 47 Conn., 400, we said:—"It may be stated, we think, as a universal rule in the construction of statutes limiting rights, that they are not to be construed to embrace the government or sovereignty, unless by express terms or necessary implication such appears to have been the clear intention of the legislature, and the rights of the government are not to be impaired by a statute unless its terms are clear and explicit,

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and admit of no other construction." This was said in a case where a debtor of the School Fund had been discharged in bankruptcy, and the question was whether the discharge affected the claim of the state; and it was held that it did not.

Blackstone says:—"The king is not bound by an act of parliament unless he be named therein by special and particular words. The most general words that can be devised, as any person or persons, bodies politic or corporate, affect not him in the least, if they may tend to restrain or diminish any of his rights or interests." 1 Black. Com., 262.

Kent says:—"It is a general rule in the interpretation of statutes limiting rights and interests, not to construe them to embrace the sovereign power or government, unless the same be expressly named therein or intended by necessary implication." 1 Kent Com., 460.

In the case of *Inhabitants of Worcester County v. City of Worcester*, 116 Mass., 193, it was held that the charter of the city of Worcester, authorizing assessments for sewers on all property benefited, did not extend to property of the county, because it was not clearly expressed that such property might be so assessed.

In *Fagan v. City of Chicago*, 85 Ill., 227, it was claimed that an assessment for benefits was void, because the lands of the state were not included in the assessment; but the court held that the general power in the charter of the city to assess persons for the special benefits which their lands received from the improvement, did not apply to the state.

In support of the contrary doctrine the appellees principally rely upon the case of *Hassan v. City of Rochester*, 67 N. York, 528. But an examination of that case will show that the decision is based upon the ground that the charter of the city of Rochester authorized the assessment of the property of the state. The court say:—"The legislature clearly has the right by positive enactment to declare that such property may be assessed for local improvements, and we think it has done so in reference to the city of Roches-

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ter. * * * We have been referred to some authorities bearing upon the subject of the liability of the state for assessments for its lands, but none of them, we think, conflict with the principle that the state, through its legislative power, may authorize its lands to be assessed for local improvements." This case clearly recognizes the principle established by the authorities we have referred to.

The appellees urge upon our consideration the fact that the property in question belonging to the state will be benefited to the amount of the assessment by the construction of the sewer, and that it is unjust that individuals should bear the burden properly belonging to the property of the state, while it virtually puts into its treasury the enhanced value of its property acquired at others' expense. It is said that this is akin to the taking of private property without compensation. But considerations like these should be addressed to the legislature, and not to the court, whose duty and power extend only to the determination of what the law is, and not to that of what it should be.

We think the property of the state is not the subject of assessment, and therefore advise the Superior Court to render judgment in favor of the appellant.

In this opinion the other judges concurred.

STATE *vs.* MARY TEAHAN.

A count in an information for selling intoxicating liquors contrary to law, that charges the defendant with "selling and exchanging" such liquors, is not bad for duplicity.

A count charging the keeping of "intoxicating liquors" with intent to sell contrary to law, is not bad for uncertainty in not stating the kind and quantity of the liquors more definitely.

The jury having found the defendant guilty on both counts, the court imposed a separate fine on each count. Held to be no error.

The purchaser of liquor knowing it to be sold contrary to law is not to be regarded as aiding and abetting the crime and is not therefore criminally

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ting himself in testifying to such sale, and his testimony is not to be regarded as that of an accomplice.

The statute (Gen. Statutes, p. 545, sec. 3,) which provides that "every person who shall assist, abet, counsel, cause, hire or command another to commit any offense, may be prosecuted and punished as if he were the principal offender," does not apply to the case of the purchaser of liquor sold contrary to law.

A written return made by the defendant to the United States internal revenue collector, declaring an intention to carry on the business of a retail liquor dealer for the ensuing year, with the payment of a tax thereon, is admissible on a trial for selling liquor contrary to law within that time, for the purpose of showing an intention to sell, both under account for an actual sale and under one for keeping liquors with intent to sell.

Proof of a sale of intoxicating liquors will support a conviction for keeping the same liquors with intent to sell, where it satisfies the jury of such keeping and intent.

INFORMATION for selling and keeping for sale intoxicating liquors; in the Superior Court in Hartford County.

The information contained two counts, the first of which charged that the defendant, at Farmington in Hartford County, "did, on the 26th day of May, 1881, unlawfully sell and exchange, and offer and expose for sale and exchange, to one George H. Fuller, certain intoxicating liquors, without a license therefor, and without having been appointed an agent of said town to sell spirituous and intoxicating liquors; against the peace and contrary to the form of the statute in such case made and provided." The second count charged that "on the 26th day of May, 1881, at said Farmington, the defendant did unlawfully own and keep with intent to sell and exchange, certain intoxicating liquors, without a license therefor and without having been appointed an agent of said town to sell spirituous and intoxicating liquors; against the peace and contrary to the form of the statute in such case made and provided."

The defendant demurred to both counts of the information as insufficient, assigning as cause of demurrer to the first count that it charged two separate and distinct offenses. The demurrer was overruled, and the defendant pleaded not guilty, and on this plea the case was tried to the jury before *Pardee, J.*

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Upon the trial the State's Attorney offered, as a part of his case in chief, the testimony of one W. W. House, who testified that he was deputy collector of United States internal revenue for this district, and that one M. M. Teahan, of Unionville, (within the town of Farmington,) on the 18th day of May, 1881, had paid twenty-five dollars as special United States tax, for the year beginning May 1st, 1881, upon the business of a retail liquor dealer, in pursuance of the written return required by law, dated April 25th, 1881, declaring her intention of carrying on the business of a retail liquor dealer and dealer in tobacco. The defendant objected to the admission of testimony as to the payment of the tax, on the ground that it was irrelevant, but the court admitted it. No specific objection was made on the ground that the defendant was not identified as the person paying the tax. He then introduced the return showing the payment of the twenty-five dollars liquor tax, and also a five dollar tax as seller of tobacco. To the admission of this return the defendant objected, but the court admitted it.

The State's Attorney also called as witnesses George H. Fuller, Asel H. Woodruff, Solon Alger, Henry Amidon, and Frederick Bowers, each of whom testified that he had bought intoxicating liquor from the defendant at her dwelling-house in Unionville, and that he knew, when he bought it, that it was sold without a license. After each of these witnesses had been sworn, and before he testified, the defendant's counsel submitted to the court the following written request, upon which, in each case, the court refused to take any action:—

"The defendant, by her counsel, requests the court to instruct the witness that he may decline to answer any questions of such a character that his answers thereto may tend to criminate himself; and that he may, therefore, decline to answer any questions of such a character that his answers thereto may tend to show that, at any time within the past twelve months, he has purchased intoxicating liquors from any person in this state who did not, at

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the time of such purchase, have a license to sell such intoxicating liquor ; provided that the witness knew, at the time of such purchase, that the person from whom he purchased did not have such license. It is not claimed that it is the privilege of the defendant to object to the answering of such questions. The only claim is that the court should instruct the witness that he has that privilege."

The State's Attorney having inquired of the witness Alger whether he had bought intoxicating liquor from the defendant, the witness said, "Do you wish me to answer that?" The court made no reply to this question, but the Attorney said, "Yes, I suppose so." The witness then answered the question in the affirmative. Being called upon by the State's Attorney to state more particularly as to the times when he had made the purchases referred to, the witness again asked whether he was obliged to answer. The defendant's counsel called the attention of the court to the objection of the witness, but the court instructed the witness that he was obliged to answer the question ; to which ruling the defendant excepted.

The defendant claimed that the witnesses who had testified as to sales made to them were not corroborated, and therefore claimed, and requested the court to charge the jury in writing, as follows :—"A person who purchases intoxicating liquor from one who, at the time of such purchase, has no license for the sale of intoxicating liquor, that fact being known to the purchaser at the time of such purchase, is himself guilty of a criminal offense, and the jury are advised not to convict upon his testimony unless it is corroborated by other testimony, showing not merely that a crime has been committed but that the accused participated in it."

But the court refused to charge as requested upon this point and instructed the jury as follows :—"The jury may convict upon the uncorroborated testimony of the person who bought the liquor knowing that the seller had no license, if that testimony satisfies each juror beyond any reasonable doubt of the guilt of the accused, the jury weighing the evidence with care and caution and giving

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due consideration to all proven circumstances and conditions."

The defendant claimed, and requested the court to charge the jury in writing, as follows:—"Proof of sales of intoxicating liquor by the defendant, without proof that other liquor than that sold was owned or kept by her, will not warrant a conviction under the second count. Proof of the sale of certain liquor is admissible only as tending to show the intent with which other liquor was owned or kept, if such other liquor was owned or kept."

But the court refused to charge as requested upon this point, and instructed the jury as follows:—"Proof of a sale of intoxicating liquor will support a conviction upon the second count, if such sale is not made the basis of the charge contained in, or of a conviction under, the first count, if such proof satisfies each juror beyond any reasonable doubt that the accused kept intoxicating liquor for sale as therein charged."

The jury returned a verdict of guilty on both counts of the information, and the court imposed a fine of sixty dollars on each count. The defendant moved for a new trial for error in the rulings and charge of the court, and also filed a motion in error, assigning as error the overruling of the demurrer to the information and the imposition of a fine on each count.

W. W. Perry, in support of the motions.

1. The first count was bad for duplicity, because it charged two distinct offenses, the unlawful *selling* and the unlawful *exchanging* of the same liquor to the same person. A sale and exchange are at common law as radically different as a sale and a gift. An exchange or barter is always for goods; a sale is of goods for money, or for money and goods. In a sale there is a fixed price; in an exchange or barter there is not. *Bouvier Law Dict. Exchange and Barter.* The courts of other states have held that proof of an exchange will not support an allegation of a sale. *Gunter v. Leckey*, 80 Ala., 591; *Stevenson v. The State*, 65

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Ind., 409; *Massey v. The State*, 12 Reporter, 361. And it has been held that a sale and a gift are distinct offenses. *Humpeler v. The People*, 92 Ill., 400. It is not like an allegation of selling and offering for sale, as they may be parts of one transaction, and represent successive stages in the same offense. "The accused has a right to know, before trial, the *exact single offense* for which he is to be tried." *Smith v. The State*, 19 Conn., 500.

2. The second count is bad for uncertainty. An averment of the kind and quantity of intoxicating liquor said to have been owned and kept, or of some other identifying circumstance, was necessary, both to inform the accused of the crime he was charged with and to insure reasonable protection against further prosecution. It is not always sufficient to charge an offense in the words of the statute creating it. *State v. Lockbaum*, 38 Conn., 400; *State v. Jackson*, 39 id., 229. It is settled by a strong preponderance of authority that in a charge for selling liquor the name of the vendee must be alleged. Bishop on Stat. Crimes, § 1037, and notes; *Commonwealth v. Thurlow*, 24 Pick., 879; *Capritz v. The State*, 1 Maryl., 574; *State v. Allen*, 32 Iowa, 491; *State v. Steedman*, 8 Rich. Law., 812; *State v. Schmail*, 25 Minn., 368.

3. The court erred in rendering a double judgment on a single information. *People ex rel. Tweed v. Liscomb*, 60 N. York, 559, 580.

4. The court erred in refusing to instruct the witness that he might decline to answer any question as to his having purchased liquor of the defendant, knowing her not to have a license, because such answer would tend to criminate himself as aiding and abetting in her crime, and in compelling him to answer such question; and in refusing to charge the jury that a person who buys intoxicating liquor, knowing it to be sold in violation of law, is himself guilty of a criminal offense. The statute provides that "every person who shall assist, abet, counsel, cause, hire or command another, to commit *any offense*, may be prosecuted and punished as if he were the principal offender." Gen. Statutes,

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p. 545, sec. 8. "The express prohibition to sell, upon every just principle of construction, must be considered as implying a prohibition to purchase. The purchaser, whether we regard his intent, or the effect and consequences of his act, is no less guilty, no less within the mischief intended to be suppressed, than the seller." *State v. Bonner*, 2 Head (Tenn.) 135.

5. The evidence of the payment of the United States tax for selling liquors was irrelevant, and the court erred in admitting it. It did not tend to prove the sale to Fuller, charged in the first count. Proof of another sale, or a habit of selling, would have tended to prove this just as much. Nor did it tend to show a sale of liquors, as charged in the second count, in violation of law. To show that a particular act charged was done with intent to violate the law, or with guilty knowledge, other acts and admissions of the accused may be shown, but they must be of such a character as to show the criminal intent or guilty knowledge clearly and unequivocally. *Coleman v. The People*, 55 N. York, 92; *Stalker v. The State*, 9 Conn., 341. The intent to be inferred from the payment of the United States tax was an intent to sell lawfully. It is certainly strange logic to say that compliance with one law indicates an intent to violate another. It is distinctly held in an Iowa case that the procuring of a United States license is not a circumstance tending to show, or affording any presumption of, a criminal act. *State v. Stutz*, 20 Iowa, 488.

6. The court erred in charging the jury that proof of a sale of intoxicating liquor would support the charge in the second count of owning and keeping the liquor thus sold with intent to sell, and in refusing to charge that there must be distinct proof of the owning and keeping. *Commonwealth v. Shepard*, 1 Allen, 581; *State v. Riggs*, 39 Conn., 498; *State v. Raymond*, 24 id., 204; *Williams v. Tappan*, 23 N. Hamp., 385, 394. A person may have been guilty of a sale under the statute who never owned or kept the liquor sold, as for instance a servant, or even a trespasser. *State v. Wadsworth*, 30 Conn., 58; Bishop on Stat. Crimes, § 1024.

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W. Hamersley, State's Attorney, contra.

CARPENTER, J. The motion in error presents three questions.

1. The first count in the information charges that the defendant did unlawfully "sell and exchange and offer and expose for sale and exchange, to one George H. Fuller, certain intoxicating liquors, without a license therefor, &c." The defendant demurred for duplicity, and the demurrer was overruled.

It is quite evident from the well-considered cases of *Barnes v. The State*, 20 Conn., 232, and *State v. Burns*, 44 Conn., 149, that the count is not bad for duplicity. It is unnecessary to repeat the reasons on which those decisions rest. It is attempted however to distinguish this case from them by suggesting that a sale and exchange are essentially different transactions, and cannot be regarded as successive stages of the same transaction. Admitting this to be so to some extent, still it fails to establish the fact that two offenses are here charged. The intention of the legislature is plain, which is to prevent the disposition of liquor for a consideration. Hence an exchange, as well as a sale, is in terms prohibited. The intention of the pleader is equally plain—to charge one transaction and one only. There is but one time and one place, and we think it was intended to charge but one act; but whether that act was a sale for cash or a sale in a broader sense by way of an exchange, the pleader not knowing alleged that it was both, so that proof of either would sustain the charge.

2. The second count charges the defendant with keeping intoxicating liquors with intent to sell contrary to law. That count is demurred to, claiming that it is bad for uncertainty, because the kind and quantity of liquor are not stated.

The information follows the language of the statute and clearly describes the precise act which the statute declares to be an offense. The statute does not require any particular kind or quantity of liquor; any quantity of any kind of

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spirituous or intoxicating liquors is sufficient, provided the jury are satisfied of the existence of the intent to sell. The term spirituous liquors or intoxicating liquors has a well understood meaning. Even as defined and enlarged by statute it embraces not a large number of liquids, and if all were enumerated they might be brought within the compass of an ordinary information. If that was done the defendant would have no more information than she now has; while if the information specifies one or two kinds the effect will be to limit the proof and might needlessly embarrass the administration of justice.

We cannot see that the defendant has suffered any hardship, or that sustaining this count will be likely to lead to any practical inconvenience.

3. Another error assigned is, that the court erred in sentencing the accused to pay a fine on each count in the information. It has for a long time been the practice in this state to try the accused for two or more misdemeanors or minor offenses charged in separate counts in the same information, and this practice has received the sanction of this court. 2 Swift's Digest, 408; *Barnes v. The State*, 19 Conn., 398.

We find no error in the record.

Several questions are also presented by the motion for a new trial.

1. The defendant's counsel requested the court to instruct certain witnesses who had purchased liquor of the defendant, and who were offered by the state to prove that fact, that they were not bound to testify to the purchase of liquor provided they knew at the time that the defendant had no license. The court disregarded this request and required the witnesses to testify. The counsel then claimed that such witnesses were accomplices, and requested the court to advise the jury not to convict upon their uncorroborated testimony. That request was refused.

These two points present the same question—whether he who knowingly purchases liquor of one unauthorized to sell is himself guilty of a criminal offense. This question

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now comes before this court for the first time. It has been decided in the negative in Massachusetts. *Commonwealth v. Willard*, 22 Pick., 476; *Commonwealth v. Kimball*, 24 Pick., 366. And in the affirmative in Tennessee. *Steele v. Bonner*, 2 Head, 185. The weight of authority is in the negative. The fact that the question has not before been raised in this state is an indication that the almost universal sentiment of the profession is that the purchaser is guilty of no offense—a fact of no little significance in determining such a question.

It is insisted however that the statute (Gen. Statutes, p. 545, sec. 3,) which provides that "every person who shall assist, abet, counsel, cause, hire, or command another to commit any offense, may be prosecuted and punished as if he were the principal offender," governs this case; it being contended that the person who purchases the liquor, induces the seller to commit the crime of selling it, and so aids and abets him in the commission of the offense.

But we are satisfied that the purchaser is not an abettor of the offense within the meaning of the statute. The "abetting" intended by it is a positive act in aid of the commission of the offense—a force, physical or moral, joined with that of the perpetrator in producing it. This is clear from the context, where abetting is classed with "assisting," "causing," "hiring," and "commanding." The abettor, within the meaning of the statute, must stand in the same relation to the crime as the criminal—approach it from the same direction, touch it at the same point. This is not the case with the purchaser of liquor. His approach to the crime is from the other side; he touches it at wholly another point. It is somewhat like the case of a man who provokes or challenges another to fight with him. If the other knocks him down, he has induced, but in no proper sense abetted, this act of violence. He has not contributed any force to its production. He touches the offense wholly on the other side. The purchaser of liquor, by his offer to buy, induces the seller of the liquor to make the sale; but he can not be said to "assist" him in it. The whole force,

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moral or physical, that went to the production of the crime as such, was the seller's.

2. The State offered to prove that on the 25th day of April, 1881, the defendant made a written return, as required by the United States statute, declaring her intention to carry on the business of a retail liquor dealer for the year commencing May 1st, 1881, and that shortly after she paid the tax required upon that business. This testimony was objected to and admitted.

Of course the evidence did not of itself prove the offense charged in the first count. But it did tend to prove an intention to carry on the business during the coming year; and that intention, especially if the jury were satisfied that it continued to the time of the alleged sale, they might well consider in determining whether there was an actual sale; not that it proved the unlawfulness of the sale—for that must be proved by other evidence—but it did tend to prove the act of selling; and that was a fact incumbent upon the State to prove.

We also think it was clearly admissible under the second count. The offense there charged required proof of three things—possession of the liquors, an intent to sell, and the want of a license. These three combined constituted the offense. Two of them, possession and no license, were susceptible of direct proof; the other, an intent to sell, must ordinarily be proved by circumstantial evidence. Any circumstance that tended to prove such an intention was admissible. A declaration by the accused that she intended to sell was clearly admissible. Conforming to the United States statute by making return and paying a tax for the privilege of selling was equivalent to such a declaration. It matters not that the transaction did not show that the intended sales would be unlawful. It was enough if it tended to show an intent to sell. The illegality of the intended sales was another matter to be shown by other evidence—the evidence that she was not duly authorized to sell.

This question came before the Supreme Court of Ver-

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mont in *State v. Intoxicating Liquors*, 44 Vt., 208. The court says:—"No question is made but that the fact of such payment, if properly proved, would be proper evidence tending to show that the claimant had procured the liquors in question for the purpose of retailing them. And no such question could be successfully made; for the fact that a person put himself to the expense of a license as a retail dealer in liquors would be quite pertinent to show that he did so for the purpose of that avocation, intending to pursue it."

The same question was decided in the same way in *State v. Wiggin*, 72 Maine, 425. See also *State v. Gorham*, 65 Maine, 270.

3. The only remaining question relates to the effect of a sale or sales proved as evidence under the second count. In behalf of the defense the court was requested to charge the jury that "proof of sales of intoxicating liquor by the defendant, without proof that other liquor than that sold was owned or kept by her, will not warrant a conviction under the second count. Proof of the sale of certain liquor is admissible only as tending to show the intent with which other liquor was owned or kept, if such other liquor was owned or kept." The court did not so charge, but charged that "proof of a sale of intoxicating liquor will support a conviction upon the second count, if such sale is not made the basis of the charge contained in, or of a conviction under, the first count, if such proof satisfies each juror beyond any reasonable doubt that the accused kept intoxicating liquor for sale as therein charged."

The point of the request seems to be, that proof of sales was not evidence that the defendant owned and kept that identical liquor with intent to sell. We think the court properly refused thus to limit the effect of the proof. It certainly did tend to evince an intent to sell that liquor; and also the fact that the defendant owned and kept it. The court however was careful to leave it for the jury to determine its weight and to guard against the possibility of punishing the defendant twice for the same act. The

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evidence being thus guarded and limited, we think the defendant has no cause of complaint.

A new trial is not advised, and there is no error in the record.

In this opinion the other judges concurred; except PARK, C. J., who dissented as to the admissibility of the return to the United States collector of internal revenue.

MARY E. HALL *vs.* JOHN A. HALL AND WIFE.

Certain lands with buildings thereon were purchased by *H*, and a conveyance of the same made at his request by the purchaser to his wife for her sole use. *H* gave his notes on time for the price, and signed a written agreement, to which his wife was not a party, to make with her a mortgage back of the property after a prior mortgage to a savings bank had been increased sufficiently to raise money to repair the buildings. Afterwards a new note and mortgage were executed by *H* and his wife to the savings bank for an increased amount, the old note and mortgage being settled in the transaction. The wife then refused to give the second mortgage in accordance with her husband's agreement. She had accepted the deed when it was given, but it did not appear that she knew of the agreement to make the mortgage. In a suit to compel her to execute the mortgage, it was held—

1. That as the wife had parted with nothing the property was not to be protected in her hands under those principles which ordinarily protect the property of married women.
2. That the fact that she had signed the note and mortgage to the savings bank did not affect the case.
3. Nor the fact that she did not know of the agreement to give the mortgage when she accepted the deed. When it came to her knowledge she could have surrendered the property and have been in no worse condition than before the deed was given; and this she was bound to do or else perform the agreement which was a material part of the consideration for the deed.
4. That the transaction created an equitable mortgage which the court would establish by its decree.

The plaintiff acquired the notes by gift. Held not to affect the case. Whether a vendor's lien, supposing it to be recognized by our law, can be enforced in favor of an assignee of the vendor's claim: *Quære*. Whether a vendor's lien exists in this state, discussed in the argument, but not decided.

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SUIT to establish an equitable mortgage and to enforce a vendor's lien; brought to the Superior Court in Litchfield County. The following facts were found by a committee.

On the 10th day of May, 1873, William Hall was the owner in fee (subject to a mortgage to the Litchfield Savings Society, on which was due about \$1,800,) of several pieces of land, with buildings thereon, situated in the towns of Litchfield and Harwinton, in Litchfield County, described in the plaintiff's complaint. On that day he agreed with John A. Hall, his son, who resided in the town of Litchfield, to sell him the property for \$5,000, subject to the mortgage, and by agreement he on that day conveyed the premises to Elizabeth E. Hall, the wife of said John, to her sole and separate use, subject to the mortgage. The record title still remains in her, subject however to a new mortgage to the Litchfield Savings Society, dated March 2d, 1877, to secure the payment of \$2,500 and interest.

No money was paid down, but John A., in consideration of the deed, gave William ten promissory notes signed by himself alone for \$500 each, dated the 10th day of May, 1873, and payable respectively in twelve, twenty-four, thirty-six, and forty-eight months, five, six, seven, eight, nine and ten years from their date; and also then, by a writing signed by himself, promised William that the said Elizabeth and he would give a mortgage on the property to secure the payment of the notes after he had increased the mortgage to an amount sufficient to put the buildings on the property in repair.

Mrs. Hall was not present at the time of the transaction, and did not know of it till after it had taken place. She subsequently accepted the deed, but it was not proved that when she accepted it she had knowledge of the execution of the notes, or of her husband's agreement that he and she should give a mortgage to secure the payment of the notes, and no evidence in writing was offered to prove that she agreed to give such mortgage.

On the 2d day of March, 1877, she and her husband executed together a new note and mortgage of the premises

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to the Litchfield Savings Society for \$2,500 (which is still outstanding) and from the proceeds thereof paid the original mortgage.

If it be competent for the said John and the said Elizabeth to testify against each other in this suit, it is found that the deed of William was given to her because the said John had received and expended a large sum of money belonging to her, and because he was in embarrassed pecuniary circumstances and could not hold property without its being liable to be attached by his creditors; also that the said John, after the execution of the last mortgage, proposed to her to give a mortgage to secure the notes given by him to William, which she declined doing. If it be not competent for said Elizabeth and said John to testify against each other, then these facts are not found.

There was no consideration proved for the deed to said Elizabeth other than is hereinbefore expressed, and she has never paid anything towards the premises, or done or given anything therefor, or on account of the same, nor has she expended anything thereon, other than as above stated.

Of the ten notes the one first payable has been paid, but the remaining nine are unpaid.

William Hall died in the year 1874, but previous thereto he assigned the notes to Catharine Freestone, now deceased. She died in the year 1878, and in her last sickness gave the notes to the plaintiff. She also left a will, which has been duly proved, by which she bequeathed all her property to the plaintiff and appointed her executrix of her will. She accepted the trust, and is now the owner of the unpaid notes, and of the agreement of said John to give the mortgage.

John A. Hall has, since the date of the notes, had no means from which they could have been collected, and is unable to pay the same. Mrs. Hall alone made defense.

Upon these facts the case was reserved for the advice of this court.

A. H. Fenn, for the plaintiff.

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1. The plaintiff is entitled to a decree establishing in her favor a vendor's lien on the premises. The doctrine of vendors' liens is based on the highest equity, and is recognized in England, in the United States courts, and in a majority of the states of the union. 2 Washb. R. Prop., 3d ed., 87; *Manly v. Slason*, 21 Verm., 271; *Kent v. Gerhard*, 12 R. Isl., 92; *Chilton v. Braiden's Admx.*, 2 Black, 460. The better opinion is, that this lien is not confined to the vendor's person, but passes to the assignee of a note given for the purchase money. *Johns v. Sewell*, 33 Ind., 1; *Lagow v. Badollet*, 1 Blackf., 419; *Chesebrough v. Millard*, 1 Johns. Ch., 409; *Johnston v. Gwathmey*, 4 Little, 317; *Edwards v. Bohannon*, 2 Dana, 98; *Watt v. White*, 33 Tex., 421; *Crow v. Vance*, 4 Iowa, 434; Sugden on Vendors, 683, and note. "The principle is well supported by authority, that if the negotiation of purchase, and agreement to sell, be with one person, but the deed be at his instance made to another, by way of gift or advancement, the person to whom the title is made will be regarded as a volunteer, taking the estate without consideration, and the lien will arise, as when the contract of sale was made with the husband, and his obligation for the money taken, but the deed was made to his wife. 6 Sm. & Marsh., 296. Also where the father, upon the marriage of his daughter, put her in possession of land as an advancement, and she and her husband contracted to sell the land, but the father made the deed. Here the daughter was the substantial vendor, and she and her husband could assert the lien." *Campbell v. Henry*, 45 Miss., 325. Whether vendors' liens exist in Connecticut, is said to be in doubt. We submit that they do. 2 Swift Dig., 128; *Watson v. Wells*, 5 Conn., 472; *Atwood v. Vincent*, 17 id., 583; *Chapman v. Beardsley*, 31 id., 115; *Middletown Savings Bank v. Fellowes*, 42 id., 45.

2. Be this as it may, however, the plaintiff is entitled to a decree establishing in her favor an equitable mortgage upon the premises. "An agreement to give a mortgage, not objectionable for want of consideration, is treated in equity as a mortgage, upon the principle that equity will

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treat that as done which by agreement is to be done. This doctrine has been asserted frequently, both in this country and in England." Jones on Mortg., (2d ed.) § 163, and numerous cases there cited; *Matter of Howe*, 1 Paige, 129. In *Daggett v. Rankin*, 81 Cal., 326, the court says:—"The doctrine seems to be well established, that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged. The maxim of equity upon which this doctrine rests is, that equity looks upon things agreed to be done as actually performed. The true meaning of which is, that equity will treat the subject matter as to collateral consequences and interests, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been." 1 Story Eq. Jur., §§ 64, 790; Willard's Eq., §§ 298, 299; *Delaire v. Keenan*, 8 Dessau., 74. The fact that Mrs. Hall did not sign the writing makes no difference; she accepted the deed, and whether she knew of the agreement or not is also immaterial, since she is a simple volunteer and has paid no consideration. Cases *supra*.

A. P. Bradstreet, for the defendant, Elizabeth E. Hall.

1. The written agreement of John A. Hall that a mortgage should be given by his wife, of course can not bind her. He had no power as husband to bind her. Courts will not enforce such a contract against a wife. *Annan v. Merritt*, 18 Conn., 487. If the plaintiff has any rights against her they must rest upon some equity growing out of the whole transaction.

2. There is nothing in the transaction to raise any equity against Mrs. Hall. The deed of the property was delivered to her, and accepted by her, without any knowledge upon her part that there were any notes outstanding which her husband had executed to the vendor, and without any knowledge that he had agreed with his father to give him a

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mortgage to secure any notes. The first intimation she had of the existence of any notes was in 1877, four years after she had accepted the deed, when her husband acquainted her with the fact. If the testimony of the husband to this effect is not admissible, then she had no knowledge of the notes until this suit was brought. Under these circumstances it would be far from equitable to hold the property in her hands chargeable for the payment of these notes. She stands virtually in the position of an innocent purchaser, without notice of any outstanding equities or incumbrance upon the property other than appeared upon the face of her deed. As between the present plaintiff and Mrs. Hall the equities are largely in favor of the latter. She has taken up the mortgage of \$1,800, which was upon the property at the time it was deeded to her, thus relieving William from his liability to that extent, and she has since given a new mortgage to the bank for \$2,500, upon which the bank holds her note for that amount, and which they can force her to pay without resorting to the property by way of foreclosure. On the other hand the plaintiff has come into possession of the notes in question by way of gift from Catherine Free-stone, to whom they had been given by William Hall. She has paid nothing for them and is placed in no worse position than she was in originally if she never collects them.

3. The claim of a vendor's lien can not be sustained. This lien has never been recognized to its full extent in Connecticut. *Dean v. Dean*, 6 Conn., 285; *Meigs v. Dimock*, id., 464, and note; *Atwood v. Vincent*, 17 id., 583. In Maine the doctrine is entirely rejected as inconsistent with the registry laws and policy of the state. *Philbrook v. Delano*, 29 Maine, 413. In New Hampshire it is undecided, as well as in Massachusetts. In Vermont the doctrine was abolished by statute in 1851. By the very nature of the case these liens are secret, and often productive of much injustice, and should not be extended beyond the requirements of the settled principles of equity. To recognize it to the extent called for by the plaintiff's claim in this case would result in establishing an unwise policy inconsistent

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with our registry laws. If William himself were living, and still held the notes, he would have no right to insist upon this lien, as his conduct shows that he did not rely upon the lien as security for the payment of the purchase money. His agreement with John whereby he was to allow the premises to be mortgaged to an unlimited extent and without restriction as to time before a mortgage was to be made to himself, precludes the idea of his relying upon this lien for his protection, and is inconsistent with the principles upon which a vendor's lien rests.

4. If a vendor's lien existed in favor of the original vendor, it certainly does not exist in favor of this plaintiff. The lien is a personal right and will not pass to the assignee by assignment of notes given for purchase money. 2 Swift Dig., 115; *Richards v. Leaming*, 27 Ill., 431; *Jackman v. Hallock*, 1 Ohio, 318; *Brush v. Kinsley*, 14 id., 20; *Hallock v. Smith*, 3 Barb., 267; *White v. Williams*, 1 Paige, 502; *Dickenson v. Chase*, 1 Morris (Iowa,) 492; *Iglehart v. Armiger*, 1 Bland, 519; *Claiborne v. Crockett*, 3 Yerg., 27; *Green v. Demoss*, 10 Humph., 871; *Shall v. Biscoe*, 18 Ark., 142; Perry on Trusts, § 238; 2 Story Eq. Jur., § 1227.

CARPENTER, J. (After stating the facts.) We think the plaintiff is entitled to the relief sought. We do not rest our judgment however on the ground of a vendor's lien. Conceding that such a lien exists in this state, there may be some difficulty in enforcing it in favor of an assignee. We choose to regard the property as subject to a mortgage in equity.

Mrs. Hall, the only party who appears to defend, cannot object to the establishment of an equitable mortgage against her on the ground that she is a *feme covert*, for she is a mere volunteer. No part of the consideration moved from her. Therefore the case is not within the principle of those cases where courts refuse to set up a deed or enforce a contract specifically against the wife. The underlying principle of those cases is protection to the wife's estate. Here her estate is in no danger. She has paid nothing and is required

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to pay nothing, except to pay for property which she has actually received. To apply the principle of those cases to this would be a perversion of it and operate as a fraud.

Nor is it important that she did not know of the agreement to give the mortgage at the time she accepted the deed. She parted with nothing then, and when the agreement afterwards came to her knowledge she could have surrendered the land and have been in no worse condition than she was in before the deed was given. In equity and good conscience she was bound to do that or else perform the agreement which was a material part of the consideration for the deed under which she holds.

Here was an agreement in writing, for a good consideration, to give a mortgage. There was an obvious reason for not giving it at the time; the existing mortgage was to be increased and the mortgage agreed to be given was to be a second mortgage. Some delay was unavoidable, and the parties took the precaution to put the agreement in writing, so that no question arises under the statute of frauds.

This seems to be a proper case for the application of the maxim that equity looks upon that as done which ought to have been done. "The true meaning of this maxim is that equity will treat the subject matter as to collateral consequences and incidents in the same manner as if the final acts, contemplated by the parties, had been executed exactly as they ought to have been, not as the parties might have executed them. * * The most common cases of the application of the rule are under agreements. All agreements are considered as performed, which were made for a valuable consideration, in favor of persons entitled to insist on their performance. They are to be considered as done at the time when, according to the tenor thereof, they ought to have been performed." 1 Story's Eq. Jur., sec. 64 *g*. See also Jones on Mortgages, (2d ed.) sec. 168, and cases cited.

Applying these elementary principles to the case before us, it is apparent that, as soon as the mortgage was given to the Savings Society, in March, 1877, the mortgage agreed

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to be given should have been given. If full justice could not otherwise be done, perhaps we might be justified in establishing the mortgage as of an earlier day, on the ground of the delay in giving the first mortgage. But that does not seem to be necessary, as, under the circumstances, security given after the mortgage was given to the bank will be effectual according to the intention of the parties.

We fail to discover that Mrs. Hall, the defendant, has any equity arising from the fact that she executed a note and mortgage to the Savings Society. She took the land incumbered to the amount of eighteen hundred dollars. That amount, if she would retain the land, she must pay. The balance she had in cash, and of course it is just and reasonable that she should pay that. Charging the land subject to that mortgage with the burden of paying the plaintiff's demand is only charging the property which she actually received; and that does her no wrong.

Nor is it any disparagement of the plaintiff's equity that she received the note as a gift or legacy. That is a matter which in no wise concerns the defendants. They cannot be permitted to say to the plaintiff,—“You paid nothing for your notes; therefore we should be permitted to hold the land without paying for it.” The plaintiff's claim is as meritorious legally as it would have been had she taken them by distribution or purchase.

We advise the Superior Court to render judgment for the plaintiff, and to pass a decree containing in substance a description of the premises, the mortgage to the Litchfield Savings Society, the notes held by the plaintiff and the amount due thereon, and declaring that the real estate, subject to that mortgage, shall stand charged with the payment of the notes in the same manner and to the same extent that it would have been if the defendants had executed a mortgage thereof on the 2d day of March, 1877.

In this opinion the other judges concurred.

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**SALISBURY SAVINGS SOCIETY *vs.* ELEANOR F. CUTTING,
ADMINISTRATRIX, AND ANOTHER.**

Whether a deed with covenants of title given before the grantor acquires title to the land conveyed, and placed on record, is to prevail over a deed given after the title is acquired to a purchaser who takes in good faith, for value, and with no notice of the previous deed: *Quære.*

If as a general rule the later deed is to prevail, yet it can not where it is a mortgage given for a pre-existing debt.

Nor where the circumstances are such as reasonably to put the second grantee upon inquiry as to the existence of the prior deed.

SUIT for a foreclosure; brought to the Superior Court in Litchfield County. The facts were found by a committee.

On the 3d of May, 1872, William E. Cutting procured from the plaintiffs a loan of \$1,400, and on the same day mortgaged to them as security for it, by a warranty deed, the property now sought to be foreclosed, which consisted of about a quarter of an acre of land in Salisbury with a dwelling house and tin shop on it. The mortgage was at once put on record.

At this time Cutting had no legal title to the premises conveyed. On the 8th of January, 1872, he had purchased the land, then without buildings upon it, for \$200, of one Coffing, who had agreed to convey it to him when that sum was paid, but had not done so when the mortgage was given to the plaintiffs, and who died soon after and before making the conveyance. On the 16th of July, 1874, Cutting made an application to the court of probate, upon which the administrators of Coffing's estate were cited in and heard, for an order that the administrators perform the agreement and convey the land to him; and such an order was made on the 23d of July, and the land conveyed by them to Cutting by deed dated the 8d of August, of the same year, though not delivered until December 1st, 1874, and not recorded until December 5th. The loan was obtained of the plaintiffs to pay the cost of erecting the buildings on the land and was used for that purpose, the mortgage being

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taken after they had been erected. The plaintiffs made no examination of the land records of the town at the time they took their mortgage.

John Scoville, the principal defendant, was the father-in-law of Cutting, and lived at Ashley Falls, in the state of Massachusetts. He had loaned him money from time to time, and on the 1st day of December, 1874, Cutting gave him his note for \$2,483, and on the 5th of December made a mortgage to him of the real estate in question as security for the note. At the time he took the mortgage he made no inquiry of Cutting as to any prior encumbrance on the property, but he took the mortgage in good faith and without any knowledge of the encumbrance. Of the \$2,483 for which the note was given, the greater part was advanced after the mortgage to the plaintiffs had been given by Cutting and put on record.

The petition of Cutting to the court of probate for an order that the administrators of Coffing convey the land to him, recited the agreement of Coffing to convey it when he should be paid the sum of \$200, and the deed of the administrators referred to the petition and order on the probate records and stated that the deed was given under the order.

The amount due the plaintiffs on their note and mortgage was found to be \$1,677.22 and that due to Scoville on his note and mortgage \$3,704. The mortgaged property was found to be worth \$1,800.

Cutting had since died, and the defendants were his administratrix, and John Scoville.

Upon these facts the court (*Hitchcock, J.*,) rendered judgment for the plaintiffs, foreclosing the defendants. The defendant Scoville brought the record before this court by a motion in error.

J. D. Hardenbergh, for the plaintiff in error.

1. The defendant Scoville had no notice of the plaintiffs' claim, either actual, presumptive or constructive. The committee finds that he took the mortgage in good faith and without any knowledge of the encumbrance. The record

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of the plaintiffs' mortgage, given two years before the mortgagor acquired title, was not notice to Scoville. He was not bound to search for such an instrument. He was not bound to go back of the delivery of the deed to Cutting. "The purchaser is not charged with notice from the record of conveyances from his grantor, prior to such grantor's acquisition of title. In such case the subsequent purchaser would not be estopped by the record of a mortgage from his grantor, prior to the date of his grantor's deed. To hold otherwise would be to impose upon the purchaser the duty of examining the record indefinitely." Wade, on the Law of Notice, § 214. "But upon both principle and authority, it seems more consonant with the spirit of the recording acts to absolve purchasers from the duty of examining the record of conveyances from their grantors, prior to the time when they had a title to convey." Id., § 216. "Such a result seems to be at variance with the recording acts of this country, which are generally held not to require an examination of the record prior to the period at which the title conveyed vested in the vendor." H. & W. notes to 3 Smith's Lead. Cas., (7th ed.), 692. See also Bigelow on Estoppel, 359; Rawle on Covenants for Title, (4th ed.), 428. If we claimed adversely to Cutting it might be said that his possession was presumptive notice, but as we claim under him and knew that he had no title until the day we took our mortgage, his possession could not be notice to us that he had conveyed a title two years before he had acquired it. At all events it was merely presumptive, and the finding rebuts the presumption. The instrument under which the plaintiff claims, taken two years before the grantor acquired title, was not within the contemplation of our recording acts. "Where the deed from the vendor is not recorded, a deed of trust or mortgage, given by his vendee, for the purchase money, will not be notice to subsequent purchasers of the unrecorded deed. There is nothing to guide the purchaser beyond the record title of the vendor, and the discovery of the mortgage for the purchase money would be purely accidental." Wade on the Law of Notice, § 207, and cases cited.

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2. The parties therefore stand in precisely the same position they would have stood in, if the instrument under which the plaintiffs claim, had not been put on record. The plaintiffs say that even then we are estopped by the covenants of their mortgage. We deny that such is the law. It is in direct conflict with the recording acts. Gen. Statutes, p. 353, sec. 11; 2 Smith's Lead. Cas., (7th Am. ed.), 692; Rawle Cov. for Title, (4th ed.), 428; Bigelow on Estoppel, 331; *Way v. Arnold*, 18 Geo., 182; *Faircloth v. Jordan*, id., 350; *Great Falls Co. v. Wooster*, 15 N. Hamp., 412; *Lessee of Buckingham v. Hanna*, 2 Ohio St., 551; *Calder v. Chapman*, 52 Penn. St., 359; *Jones v. Kearney*, 1 Dru. & War., 159; *Lloyd v. Lloyd*, 4 id., 369. It is also contrary to the statute of frauds. Bigelow on Estoppel, 358; Rawle on Cov. for Title, 480; *Bivins v. Vinzant*, 15 Geo., 521; *Faircloth v. Jordan*, 18 id., 350. The modern covenant of warranty does not pass the land as to subsequent purchasers without notice. It does not act as a technical estoppel, but simply as a rebutter. Bigelow on Estoppel, 355; 2 Smith Lead. Cas., (H. & W. notes, 7th ed.), 693.

3. The equities are with the defendant Scoville. He took his mortgage, as the committee has found, in good faith without notice. The plaintiffs were guilty of laches. They knew, or were bound to know, that Cutting had no title; they took their mortgage with their eyes open, and assumed all the risk. "But the strongest arguments against permitting the conclusion of the covenant or recitals in a deed to extend beyond the person of the grantor to an estate which he does not hold at the time, is that it necessarily tends to give a vendee, who has been careless enough to buy what the vendor has not got to sell, a preference over subsequent purchasers, who have expended their money in good faith, and without being guilty of negligence." 2 Smith Lead. Cas., (7th ed.), 700. They could have seen to it that the contract between Coffing and Cutting was put on record, and thus supplied the missing link in their chain of title, which might have led the defendant to their mortgage. Our

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statutes provide that such a record shall secure to a party the equitable title that the contract creates. This would have protected the plaintiffs, since such an equitable title could be conveyed or mortgaged, and would have been full legal notice to us. Gen. Statutes, p. 354, sec. 13.

C. B. Andrews and *D. T. Warner*, for the defendants in error.

1. It clearly appears from the finding that Cutting had an equitable interest in the premises from the time of his taking possession of the same, though he did not have the legal title; for the finding shows that he was in possession "claiming to own the same," and that he had erected a building thereon, which then constituted, as it does now, the principal value of the property. The administrators of Coffing's estate recognized this equitable interest, and conveyed nothing but the land to Cutting. The court of probate also recognized Cutting's equity in the premises. It was an interest that he could sell and convey or mortgage. Gen. Statutes, p. 354, sec. 13. It was such an equitable interest as a court of chancery would have protected by decreeing a specific performance of the contract. *Green v. Finin*, 35 Conn., 178.

2. Cutting's mortgage with warranty to the plaintiffs, he afterwards having acquired the legal title, is just as effectual as if he had had the legal title when he gave the mortgage. Where one having no title to land conveys the same with warranty by a deed which is duly recorded, and afterwards acquires a title, and conveys to another, the second grantee is estopped to aver that the grantor was not seized at the time of his conveyance to the first grantee. 3 Washb. Real Prop., 110, sec. 50; 1 Swift Dig., 364. It has repeatedly been decided in Connecticut, that if one who conveys lands with warranty, but without title, subsequently acquires title, he and all claiming under him are estopped from setting up such title against the first grantee. The subsequent title enures to the benefit of the first grantee. *Coe v. Talcott*, 5 Day, 92; *Hoyt v. Dimon*, id., 483; *Dudley v.*

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Cadwell, 19 Conn., 226. The same doctrine prevails in other states. *Somes v. Skinner*, 3 Pick., 52; *White v. Patten*, 24 id., 324; *Russ v. Alpaugh*, 118 Mass., 376; *Teft v. Munson*, 57 N. York, 97; *House v. McCormick*, id., 310; 2 Smith Lead. Cas., 625; Rawle on Cov. for Title, 392; Bigelow on Estoppel, 844, 847.

3. The defendant Scoville had constructive notice of the existence of the plaintiffs' mortgage. There is no difference in legal effect between actual and constructive notice. 3 Washb. R. Prop., 283; *Sumner v. Rhodes*, 14 Conn., 139. Open and notorious possession is sufficient to put a purchaser on inquiry as to the existence of a deed. Especially so when it had continued for more than two years, and been accompanied by acts of ownership such as enclosure and the erection of a building. 3 Washb. R. Prop., 284. The law imputes to a purchaser a knowledge of all facts relating to the same land on the muniments of title which it was necessary for him to inspect in order to ascertain the sufficiency of such title. 3 Washb. R. Prop., 292. An examination of the muniments of title in this case would have disclosed to the defendant the existence of the plaintiffs' mortgage; and this, with the administrators' deed to Cutting, and the references therein to the proceedings in the probate court, would have satisfied any honest inquirer that Cutting had an equitable interest in the premises when he mortgaged the same to the plaintiffs. The equities are all with the plaintiffs, for their money paid for the improvements on the land which to-day constitute its principal value, and Scoville had ample constructive notice. Therefore it would be inequitable to permit him to be prior in right, when his mortgage is not only so long subsequent in time to the plaintiffs', but the debt itself claimed to be secured thereby has mostly accrued since the record of their mortgage.

PARK, C. J. This case has been argued before us as if it necessarily involved the question whether a deed given with covenants of warranty before the grantor acquires title to the land conveyed, is to prevail over a deed given, after the

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title is acquired by the grantor, to a purchaser who takes it in good faith and with no knowledge of the previous deed and for value. If we were called upon to decide this question we should regard it as one of very serious difficulty, inasmuch as in sustaining the later deed we should have to deny the controlling application to the case of the well settled principles of estoppel, while in sustaining the prior deed we should have to violate the entire spirit of our registry system, which it is the policy, and we may say in every other case the unyielding policy, of the law to sustain.

But there are two points in the present case, either of which we think delivers it from the control of that question, and which will enable us to decide it upon its special facts.

1. It does not appear that the defendant was a purchaser for value. The judgment below was for the plaintiffs, and as the defendant has brought the proceeding in error, it is necessary that this fact should appear, expressly or by necessary implication, upon the record. All that is found is that "the greater portion" of the defendant's claim accrued after the deed was given to the plaintiffs. It is clear therefore that, so far as the portion which accrued before is concerned, the defendant was not a purchaser for value, and that so far there is no error in the judgment. Now what is found with regard to the remainder of the defendant's claim? He sets up in the answer, and this part of his answer is found true, "that on the 5th day of December, 1874, said Cutting owed him \$2,483, as evidenced by his promissory note for that amount, dated at Ashley Falls, Massachusetts, December 1st, 1874"; and that "on said 5th day of December, 1874, the said Cutting, to secure said note, mortgaged to him" the land in question. By turning to the deed, a copy of which is annexed to the finding, it appears that the mortgage to the defendant was executed at Salisbury in this state, the presumption being that it was sent to the defendant in the state of Massachusetts after it was recorded, and that he was not present at its execution; this point however not being important. Here then, in the defendant's statement of his own case, the most that is

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averred is, that on the first day of December, 1874, the mortgagor gave him a note for the mortgage debt—but it does not appear that the debt had not all accrued before the note was given. The fact that a considerable part of it had accrued three years before makes it very probable that the rest accrued by occasional loans or advances, and that at the time the note was given no additional advance was made. At any rate it is clear that we can not assume, for the purpose of finding error in the record, that any money was then advanced, when no such fact appears, either upon the finding or upon the defendant's answer. If, as we must infer, the defendant was not a purchaser for value, it is very clear, upon well settled principles, that he can not prevail in equity over the plaintiffs, who advanced the whole amount of their mortgage debt when they took their mortgage.

2. We think that upon the facts found the defendant was fairly put upon inquiry as to the plaintiffs' mortgage, and does not stand before the court as a *bond fide* purchaser without notice. It is true that he avers in his answer "that the mortgage was taken by him in good faith and without any knowledge or notice on his part that there was any incumbrance on said land in favor of the Salisbury Savings Society or any other person;" and that the committee has found this part of his answer true. But without such actual knowledge the facts may be such as to have made it his duty to inquire after such prior mortgage, and sufficient to charge him in law with notice of what on such inquiry he would have found. Let us see what these facts are. The defendant was the father-in-law of Cutting, the mortgagor, and while from this relation and his residence in the vicinity he would be likely to be better informed than most men with regard to his property and business, it appears that he was in fact, during all the time covered by these transactions, making him advances or loans of money, having, as we have seen, advanced him a considerable part of the \$2,483 for which he finally took his note, before the plaintiffs took their mortgage. It is hardly possible that his pecuniary

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interest in Cutting's prosperity should not have led him to inform himself, with his special opportunity as well as reason for asking the information of Cutting, as to the property transactions of the latter. He would thus have known of his contracting for the purchase of the lot in question, and of its small value, found to be only \$200 at the time of the purchase; of Cutting's entering into possession, an indication of itself of his having acquired some kind of right; of his erection of a building thereon, which was found to be of the value of fourteen hundred dollars; of his having no means of his own for such an outlay and of the money necessarily having been procured as a loan; and it may be inferred from all the facts that he must have known that if he had procured such a loan it must have been on some security, and almost necessarily upon the property. Now when, in these circumstances, he took his mortgage, as it is found, without making any inquiry of Cutting as to any prior incumbrance, it seems almost like an intentional avoidance of an inquiry, and as if he desired to take his chance for the securing of his accumulating debt on the property, taking what he could get and holding what he could hold.

But there is a further fact in this connection that deserves notice. The mortgage to the defendant refers for fuller particulars about the property to the probate records, giving the volume and page. These records, at the place referred to, show a petition of Cutting, dated July 16th, 1874, stating the contract of Coffing, (who had owned the property and who had since died,) dated January 8th, 1872, for the conveyance of the lot in question to him for the consideration of \$200, and praying that Coffing's administrators might be directed to give him a deed of the premises. The defendant may properly be held chargeable with notice of all that appears upon this record. He therefore knew that three years before his own mortgage was taken Cutting had a contract for a conveyance of the land in question, and consequently an equitable title; and that this equitable title he might have conveyed or incumbered. Indeed under

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a statute which had then been in force many years, Cutting could have had his contract recorded and thus his equitable title made secure. It was the defendant's duty to search the records and make sure that this equitable title, which for aught he knew had thus been put on record, had not been conveyed away or incumbered, and was especially his duty to make inquiry with regard to the matter of his son-in-law, who presumably would not have deceived him, especially in view of the fact that the latter had, immediately after taking the contract, entered into possession and expended fourteen hundred dollars in the erection of a building on the lot.

Upon all the facts of the case we can not regard the defendant as a purchaser either for value or without notice of the title of the plaintiffs.

We do not find any error in the judgment complained of.

In this opinion the other judges concurred.

NOTE. The question which the court leaves undecided in the foregoing case—whether a deed given with covenants of title before the grantor has acquired any title to the land conveyed, is to prevail over a later deed given, after the grantor has acquired title, to a purchaser who takes it in good faith and with no knowledge of the previous deed and for value—is of great interest to the profession and importance to the public. As the Chief Justice well remarks, if the later deed is sustained it violates the well settled principles of estoppel; if the prior one, the entire spirit of our registry system.

The weight of authority is in favor of the prior deed. There is a question made as to the precise mode in which that deed operates in drawing to itself the title, whether it be by the covenants which it contains and which estop the grantor and his privies in estate, or by the warranty operating as a bar to the later title; but the authorities generally treat the case as one of estoppel, and give the estoppel its usual force not only against the grantor but against his privies in estate.

The prevailing doctrine on the subject is thus summarized by Mr. Washburn in his work on Real Property, (book 3, ch. 2, sec. 6, art. 50):—“So where one conveys land with warranty, but without title, and afterwards acquires one, his first deed works an estoppel, and passes an estate to the grantee the instant the grantor acquires his title. And such title would enure to the benefit of the first grantee by estoppel, to the exclusion of a second grantee, to whom the grantor shall execute a deed after having acquired a title; though it has been insisted that such a construction does violence to the spirit of the system of registration of deeds, which ordina-

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rily requires that in taking a title one should only go back to the time his grantor acquired it and see that no *intermediate* incumbrance or conveyance shall have been made by him." And in the next paragraph he says:—"The doctrine here stated * * is probably too well settled to be now controverted;" but he proceeds to state that it has been repeatedly called in question by recent commentators and in some judicial opinions.

That the doctrine here laid down is in direct conflict with the entire spirit of our registry system can hardly be questioned. It is the policy of the law that all conveyances of title to land shall appear upon the public records, and in such a place and manner that a searcher of titles would readily find his way to them. Now it would not be claimed for a moment that the most expert searcher is in fault for not discovering the record of a conveyance made by a person who had no title. The rule clearly is, and must be, that the searcher is expected to look only to the chain of title, beginning in the case of each particular grantor only with the conveyance to him, and inquiring for any later conveyance made or incumbrance created by him. This is all that could be required of the utmost diligence, for it is not merely the immediate grantor who may have given a deed to some party before he acquired title, but any prior grantor may have done it, and its effect on the chain of title would be equally fatal, unless an adverse possession of fifteen years had established the title. There may have been twenty conveyances during that period, and any one of the grantors may have created an estoppel, while the grantee under the estoppel may have been in such a condition, from *coverture*, or *infancy*, or other cause, that an adverse possession may not have been able to settle the title within the ordinary period. It of course can not be required of a searcher of titles that he carry his investigation so far as to make sure that no such untraceable and really secret estoppel shall be anywhere lying in ambush to entrap the title.

In *Calder v. Chapman*, 52 Penn. St., 359, the question was whether, when the records showed an absolute conveyance to Calder from Chapman, it was necessary, in searching Calder's title, to go back of the conveyance of Chapman to him, so as to take in any possible conveyance made by Calder before he acquired title. The court say (p. 362):—"In searching for incumbrances or conveyances, the search against Calder would begin with his title from Chapman, and the search beyond would be against Chapman and those through whom he claimed; and a search against Calder during the same period would be considered an utter absurdity." In *Wood v. Farmere*, 7 Watts, 385, GIBSON, C. J., says:—"By the English principles of notice a purchaser is presumed to have known nothing which lay out of the course of his title; and I see nothing in our registry acts by which he is presumed to have known anything which lay not in it or was not connected with it." And in *M' Lanahan v. Reeside*, 9 Watts, 510, the same learned judge says that a creditor in search of a clew to the title, would not be bound to take notice of a conveyance not lying in the channel of the title, though actually recorded. In *Loan & Trust Co. v. Maliby*, 8 Paige, 361, it is said that a purchaser "is not required to search for mortgages upon the premises purchased, as against his grantor, previous to the time such grantor obtained his title thereto." And we have seen that

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Mr. Washburn, in his work on Real Property, says that "the system of registration ordinarily requires that in taking a title one should only go back to the time his grantor acquired it, and see that no *intermediate* incumbrance or conveyance shall have been made by him."

It may therefore be taken for granted that the registration system does not require the later grantee to search the records for any possible conveyance made by the grantor or any of his grantors before he or some of them acquired title, and that he is therefore in no fault for not knowing of the existence of the prior conveyance. The record of that conveyance can operate against his title only in a technical way, and upon ground which is utterly unsupported by equity or reason. That ground is this:—By the estoppel the defendant is not permitted to deny that the mortgagor had a title when he made the first conveyance. He stands therefore, so far as the defendant's rights are concerned, as if he had a title at that time. If he had had a title when he made that conveyance, that conveyance would not have been good against the later grantee unless it was recorded, or he had actual notice of it. But it was recorded; so that the prior grantee's title became complete *by reason of his record*, when that record was one that the later grantee was not bound to look for, and could not have found upon any reasonable amount of search. The prior grantee's entire title, both by estoppel and by the record of this deed, rests upon mere fiction—a mere theory. To sustain his claim of title practical justice must be sacrificed to a mere artificial rule that has no foundation in reason. But law was intended to be a practical thing, the perfection of reason, doing justice among men and protecting substantial rights; breaking through, so far as possible, all mere matters of form for the sake of the substance.

The law has no policy which it cherishes more than the one that favors and upholds our registry system; and it would seem as if, in a conflict of that system with a mere theory, the whole current of professional opinion would be in favor of sustaining that system at the sacrifice of the theory. Indeed the theory was established as a part of the common law before the registry system was known, and therefore without reference to it. That system as the later established and as an outgrowth of the progress of society and the product of riper experience, should prevail over everything, no matter how embedded in the ancient law, that would defeat or embarrass its operation.

This view is strongly supported by occasional decisions, by dissenting opinions, and by the remarks of highly respectable commentators, in their consideration of this question. Thus Mr. Hare, in his notes to Smith's Leading Cases, (3 Smith Lead. Cases, 7th Am. Ed., 692, side p. 626,) protests vigorously against the prevailing doctrine, though basing his opinion in part on what he regards as its "inconsistency with the principles of the common law on which it assumes to be founded." But with regard to its conflict with the system of registration, he speaks as follows:—"But the strongest argument against permitting the conclusion of the covenants or recitals in a deed to extend beyond the person of the grantor to an estate which he does not hold at the time, is that it necessarily tends to give a vendee, who has been careless enough to buy what the vendor does not have to sell, a preference over subsequent purchasers who have expended

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their money in good faith and without being guilty of negligence. Such a result seems to be at variance with the recording acts of this country, which are generally held not to require an examination of the record prior to the period at which the title conveyed vested in the vendor. To allow a title to pass by a conveyance, executed and recorded before it is acquired, may therefore be a surprise on subsequent purchasers, against which it is not in their power to guard, and is contrary to the equity which is the chief aim of the doctrine of estoppel as moulded by the liberality of modern times." Mr. Rawle in his work on Covenants for Title, says, (p. 428, 4th ed.):—"This result, when applied to the case of a *bond fide* purchaser without notice, can not harmonize with the spirit of the registry acts in force in this country, and leads to the position, which can not be considered as tenable, that a purchaser must search the registry of deeds, not only from the time when his grantor acquired title, but also for a series of years before that time, in order to discover whether he had previously made any conveyance (though without title) to any other person; and if the property has passed through several hands, a similar search must be made with respect to every one through whose hands the title has thus passed. Such a doctrine, thus carried to its logical results, can not stand the test of experience; and it is not to be wondered at that, in recent cases decided since these suggestions were first made, courts have distinctly held that, as against a subsequent purchaser without notice, the after-acquired title does not enure to a prior grantee." Wade (on the "Law of Notice," § 214), says:—"The purchaser is not charged with notice from the record of conveyances from his grantor prior to such grantor's acquisition of title. In such case the subsequent purchaser would not be estopped by the record of a mortgage from his grantor, prior to the date of his grantor's deed. To hold otherwise would be to impose upon the purchaser the duty of examining the records indefinitely." Bigelow also, in his work on Estoppel, p. 381, contends that upon principle, aside from any consideration of the registry system, a former deed of warranty, before the grantor acquired title, does not hold the land against a subsequent purchaser without notice. In *Way v. Arnold*, 18 Geo., 181, it is held that, under modern conveyances, with or without warranty, title to land subsequently acquired does not pass to the grantee by estoppel, (sustaining the view of Mr. Hare, in his note to Smith's Leading Cases, before referred to,) while upon the conflict of the opposite doctrine with the system of registration, the court says (p. 198):—"We are strongly inclined to the opinion that our registry acts, under the modern form of conveyancing, are a virtual repeal of the doctrine of estoppel." The question was recently before the Supreme Court of Rhode Island, in the case of *McCuskee v. McEvey*, 6 R. Isl., 528. The majority of the court sustain the title of the prior grantee by force of the estoppel, though DURFEE, J., who gives the opinion of the court, speaks of the doctrine as "operating as a snare rather than as a protection to purchasers." POTTER, J., gives a dissenting opinion of great ability, which appears in 10 R. Isl., 606.

But, independently of the view we have been considering, there is another principle which, it would seem, can be properly applied to the case and which would bring us to the same result. It is a well-settled rule that

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where a loss must fall upon one of two equally innocent parties it shall be borne by him whose act, however innocent, caused it. Now supposing the prior grantee, in taking a deed from a party who had no title, is to be regarded as equally free from negligence with the later grantee, who did his full duty in searching the records; yet it was the act of the former, in taking a conveyance in such an unusual manner, that caused the whole difficulty. Now does not the application of that well established rule put the loss upon the prior grantee rather than upon the later one?

But this is upon the supposition that the prior grantee is not in fault. Much more should he bear the loss where he has been clearly guilty of negligence. If he took his deed without knowledge of the want of title in his grantor, he would seem to have been guilty of gross carelessness in not examining the public records. If he knew he had no title and was willing to take his chance for his acquiring one, the case becomes almost one of fraud upon a person who purchases in good faith and for value after a title has been acquired. It would seem to violate every principle of equity to allow a party guilty of either to prevail over the innocent and diligent later purchaser.

In *Prince v. Case*, 10 Conn., 381, WILLIAMS, C. J.; in giving the opinion of the court, says:—"The policy of our law is that titles to real estate shall appear upon record, so that all may in this way be informed where the legal estate is. But were this new mode of conveyance to prevail, [the acquisition of an interest in land by means of a mere license to build upon it] incumbrances might frequently be found to exist against which no vigilance could guard, no diligence protect. Our records would be fallacious guides; and when we had gained all the information they could give we should remain in doubt as to the title. It is much better to leave those who had ventured to rely upon the word or honor of another to resort to that word or honor for redress [or in this case to the covenant for title] than to suffer a person who had resorted to the official register to be defeated by secret claims of this kind. The law can not prefer the claims of those who take no care of themselves to those who have faithfully used all legal diligence. If a loss is to be sustained it is more reasonable that he who has neglected the means the law put into his power should suffer, rather than he who has used those means."

If a deed made when the grantor has no title is to be sustained by a mere estoppel against a *bona fide* purchaser, who takes his title after the grantor has acquired one, and with no knowledge, and really no means of knowledge, of the prior deed, it will be putting a premium upon negligence, and allowing an innocent party to suffer for the gross carelessness of another.

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Hallock v. Smith.

ORION J. HALLOCK vs. HASKELL G. SMITH, ADMINISTRATOR.

An administrator, carrying on a farm that belonged to the estate of the intestate, purchased on credit a yoke of oxen to be used on the farm. Held that the administrator personally was liable to the seller for the price, and that the estate was not liable.

And held that the estate was not rendered liable in equity by reason of the fact that the oxen had been sold by the administrator and the proceeds used in paying for labor hired in carrying on the farm.

The carrying on of a farm belonging to the estate is no part of an administrator's proper duties; but the administrator would alone have been liable, even if the debt had been incurred in the ordinary administration of the estate.

CIVIL ACTION to recover the price of a yoke of oxen sold; brought before a justice of the peace, and, by appeal of the plaintiff, to the District Court of Litchfield County. Facts found and case reserved for advice. The case is sufficiently stated in the opinion.

C. B. Andrews and A. T. Roraback, for the plaintiff.

H. B. Graves and H. H. Prescott, for the defendant.

CARPENTER, J. The defendant purchased of the plaintiff, on credit, a yoke of oxen to be used on a farm which he was carrying on as administrator. The defendant subsequently sold the oxen and used the avails to pay for labor on the farm. This suit is brought to collect from the estate the price of the oxen.

In *Taylor v. Mygatt*, 26 Conn., 184, this court held that an administrator in incurring expenses in settling the estate had no power to bind the estate by contract; that any expense thus incurred was a claim against him personally; but was not a claim that could be enforced against the estate. And this was held in respect to the probate fees and fees for professional services rendered for the administrator as such. This being so in respect to the ordinary

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expenses of administration, which were properly and necessarily incurred, it must be so and with more reason in regard to expenses which do not pertain to administration and which were improperly incurred. The case before us is of that character. It was no part of the administrator's duty to carry on the farm, hire laborers, and buy and sell oxen. He and not the estate is responsible for any debt thus incurred.

It is practically conceded that such is the law; but it is claimed that in equity the estate is liable. We cannot sanction this claim. In matters of this kind equity follows the law. Sound policy, both in law and equity, forbids an administrator as such from engaging in business except in special circumstances and for special purposes. The argument that the estate had the benefit of the oxen purchased assumes too much; it assumes that the farm was carried on in the interest and for the benefit of the estate—the very thing which the law forbids.

Judgment is advised for the defendant.

In this opinion the other judges concurred.

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JAMES CAMPBELL *vs.* THE NEW YORK & NEW ENGLAND RAILROAD COMPANY.

The matter of the fencing of their lines by railroad companies is wholly one of statute regulation. In the absence of a statute requiring it there is no duty to maintain fences.

Land was taken for a railroad track at a time when a statute was in force requiring railroad companies to fence their lines except where the railroad commissioners should determine that a fence was not necessary, and in the appraisal of damages to the land-owner nothing was allowed for the expense of maintaining a fence. The statute was afterwards repealed and a new one passed requiring railroad companies to fence only where the railroad commissioners should order it. Held that there was no obligation on the part of the railroad company to maintain the fence, in the absence of an order from the railroad commissioners.

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ACTION for damages for the killing of a horse of the plaintiff, by the negligent running of a train of the defendants; brought to the Superior Court in Tolland County. The case was heard in damages, after a default, before *Beardsley, J.*, who found the facts and awarded only nominal damages. The plaintiff brought the record before this court by a motion in error. The case is fully stated in the opinion.

M. R. West and *D. Marcy*, for the plaintiff.

G. W. Phillips, for the defendants.

PARDEE, J. In 1862 the Rockville Branch Railroad Company took for railroad uses a piece of land by an appraisement which did not include the cost of fencing. The law then required all railroad companies to fence their lines except at points where the railroad commissioners should determine that there was no necessity for fencing. Soon after taking possession the company built a fence; in November, 1879, it leased its railroad to the defendant, the New York & New England Railroad Company, which is now operating it.

The plaintiff is the owner of land adjoining this railroad, and is the grantee of the person from whom the Rockville Branch Railroad Company took land. In 1880 the defendant did not maintain a sufficient fence between its own and the plaintiff's land, and in that year the horse of the latter went from his lot upon the railroad track and was killed by the defendant's engine. The plaintiff instituted this suit; the defendant suffered a default, and moved to be heard as to the damages; upon the hearing the plaintiff made no claim that the railroad commissioners had ever ordered the construction of a fence between his land and that of the defendant; the court found that the defendant was running the engine properly and without negligence; and assessed the plaintiff's damages at a nominal sum. He filed a motion in error.

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The Rockville Railroad Company became the proprietor, upon payment of full consideration therefor, of the land upon which the plaintiff's horse was killed. It did not, in addition to such payment, come under any obligation, express or implied, to the person from whom it was taken, although he remained an adjoining proprietor, in reference to fencing. His rights and the duties of the railroad company in that regard were subjects of statutory regulation.

The statute as a matter of public policy, as a matter of protection to life and property, required the company to fence the land unless it could prove to the railroad commissioners that a fence was not necessary for that purpose and therefore be by them excused from erecting it. In 1875 the legislature changed its mode of securing public protection; an act was passed making it the duty of the railroad companies to fence wherever the railroad commissioners ordered them so to do. Since then, if the manner of use of its land by the defendant made it necessary to the full enjoyment by the plaintiff of his own that there should be a fence between them, it has been his right to show that fact to the railroad commissioners and their duty to make and enforce an order upon the company to erect and maintain one.

The plaintiff has never satisfied them that such fence is necessary; they have never ordered the defendant to build one; it therefore was guilty of no wrong to the plaintiff in using its land without one. In reference to the land in question the matter has at all times been one of obedience to a public statute; never one of keeping or breaking a contract with an individual; the obligation upon the railroad company to fence comes into existence, is modified, or goes out of existence, by the enactment, change or repeal of statutes.

There is no error in the judgment complained of.

In this opinion the other judges concurred; except ~~CARPENTER~~, J., who dissented.

In re Hall.

IN THE MATTER OF MARY HALL.

The statute (Revision of 1875, p. 44, sec. 29,) provides that the Superior Court "may admit as attorneys such persons as are qualified therefor agreeably to the rules established by the judges of said court." This statute has come down, with some changes, from the year 1750, and in essentially its present form, from the year 1821. Held that under it a woman could be admitted as an attorney.

APPLICATION to the Superior Court in Hartford County for admission as an attorney, reserved for the advice of this court.

J. Hooker and T. McManus, for the applicant.

G. Collier, contra.*

PARK, C. J. This is an application by a woman for admission to the bar of Hartford county. After having completed the prescribed term of study she has passed the examination required by the rules of the bar and has been recommended by the bar of the county to the Superior Court for admission, subject to the opinion of the court upon the question whether as a woman she can legally be admitted. The Superior Court has reserved the case for our advice.

The statute with regard to the admission of attorneys by the court is the 29th section of chapter 3, title 4, of the General Statutes, and is in the following words:—"The Superior Court may admit and cause to be sworn as attorneys such persons as are qualified therefor agreeably to the rules established by the judges of said court; and no other person than an attorney so admitted shall plead at the bar of any court of this state, except in his own cause."

* The bar of the county voted to recommend the admission of the applicant subject to the opinion of the court whether, as a woman, she could be legally admitted, and appointed Messrs. McManus and Collier to argue the case before the court.

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It is not contended, in opposition to the application, that the language of this statute is not comprehensive enough to include women, but the claim is that at the time it was passed its application to women was not thought of, while the fact that women have never been admitted as attorneys, either by the English courts or by any of the courts of this country, had established a common-law disability, which could be removed only by a statute intended to have that effect.

It is hardly necessary to consider how far the fact that women have never pursued a particular profession or occupied a particular official position, to the pursuit or occupancy of which some govermental license or authority was necessary, constitutes a common-law disability for receiving such license or authority, because here the statute is ample for removing that disability if we can construe it as applying to women; so that we come back to the question whether we are by construction to limit the application of the statute to men alone, by reason of the fact that in its original enactment its application to women was not intended by the legislators that enacted it. And upon this point we remark, in the first place, that an inquiry of this sort involves very serious difficulties. No one would doubt that a statute passed at this time in the same words would be sufficient to authorize the admission of women to the bar, because it is now a common fact and presumably in the minds of legislators, that women in different parts of the country are and for some time have been following the profession of law. But if we hold that the construction of the statute is to be determined by the admitted fact that its application to women was not in the minds of the legislators when it was passed, where shall we draw the line? All progress in social matters is gradual. We pass almost imperceptibly from a state of public opinion that utterly condemns some course of action to one that strongly approves it. At what point in the history of this change shall we regard a statute, the construction of which is to be affected by it, as passed in contemplation of it? When the statute

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we are now considering was passed it probably never entered the mind of a single member of the legislature that black men would ever be seeking for admission under it. Shall we now hold that it cannot apply to black men? We know of no distinction in respect to this rule between the case of a statute and that of a constitutional provision. When our state constitution was adopted in 1818 it was provided in it that every elector should be "eligible to any office in the state" except where otherwise provided in the constitution. It is clear that the convention that framed, and probably all the people who voted to adopt the constitution, had no idea that black men would ever be electors, and contemplated only white men as within any possible application of the provision, for the same constitution provided that only white men should be electors. But now that black men are made electors, will it do to say that they are not entitled to the full rights of electors in respect to holding office, because an application of the provision to them was never thought of when it was adopted? Events that gave rise to enactments may always be considered in construing them. This is little more than the familiar rule that in construing a statute we always inquire what particular mischief it was designed to remedy. Thus the Supreme Court of the United States has held that in construing the recent amendments of the federal constitution, although they are general in their terms, it is to be considered that they were passed with reference to the exigencies growing out of the emancipation of the slaves, and for the purpose of benefiting the blacks. *Slaughter House Cases*, 16 Wall., 67; *Strauder v. West Virginia*, 100 U. S. Reps., 806. But this statute was not passed for the purpose of benefiting men as distinguished from women. It grew out of no exigency caused by the relation of the sexes. Its object was wholly to secure the orderly trial of causes and the better administration of justice. Indeed the preamble to the first statute providing for the admission of attorneys, states its object to be "for the well-ordering of proceedings and pleas at the bar."

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The statute on this subject was not originally passed in its present form. The first act with regard to the admission of attorneys was that of 1708, which was as follows:—"That no person, except in his own cause, shall be admitted to make any plea at the bar without being first approved by the court before whom the plea is to be made, nor until he shall take in the said court the following oath," etc. Col. Records, 1706 to 1716, p. 48. This act seems to have contemplated an approval by the court in each particular case in which an attorney appeared before it. The first act with regard to the general admission of attorneys appears in the revision of 1750, and is as follows:—"That the county courts of the respective counties in this colony shall appoint, and they are hereby empowered to approve, nominate and appoint attorneys in their respective counties, as there shall be occasion, to plead at the bar; * * and that no person, except in his own case, shall make any plea at the bar in any court but such as are allowed and qualified attorneys as aforesaid." Thus the statute stood until the revision of 1821, when for the first time it took essentially its present form. Up to this time the word "person" had been used in this statute only in the clause that "no person" should be allowed to practice before the courts except where formally admitted by the court, a use of the word which of course could not be regarded as limited to the male sex, as women would undoubtedly have been held to be included in the term. The language of the statute as now adopted was as follows:—"The county courts may make such rules and regulations as to them shall seem proper relative to the admission and practice of attorneys; and may approve of, admit and cause to be sworn as attorneys, such persons as are qualified therefor agreeably to the rules established; * * and no person not thus admitted, except in his own cause, shall be admitted or allowed to plead at the bar of any court." The statute in this form passed through the compilations of 1835 and 1838, the revision of 1849 and the compilation of 1854, and appears with a slight modification in the revision of 1866. The

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county courts had now been abolished, and the power to admit attorneys, as well as to make rules on the subject, had been given to the Superior Court; the expression "such persons" being preserved, and the provision that "no person" not thus admitted should be allowed to plead, being omitted.

The statute finally took its present form in the revision of 1875. It retains the provision that the Superior Court may make rules for the admission of attorneys, and provides that the court "may admit and cause to be sworn as attorneys such persons as are qualified therefor agreeably to the rules established," and restores the provision, dropped in the revision of 1866, that "no person other than an attorney so admitted shall plead at the bar of any court in this state, except in his own cause."

These changes, though not such as to affect the meaning of the statute at any point of importance to the present question, are yet not wholly without importance. The adoption by the legislature of a revision of the statutes becomes, both in law and in fact, a re-enactment of the whole body of statutes; and though in determining the meaning of a statute we are not to regard it as then enacted for the first time, especially if there be no change in phraseology, yet where there is such a change, it follows that the attention of the revisers had been particularly directed to that statute, as of course also that of the legislature, and that with the changes made it expresses the present intent of both. Thus in this case it is clear that the revisers gave particular thought to the phraseology of the statute we are considering, and put it in a form that seemed to them best with reference to the present state of things, and decided to leave the words "such persons" to stand, with full knowledge that they were sufficient to include women, and that women were already following the profession of law in different parts of the country. The legislators must be presumed to have acted with the same consideration and knowledge. It would have been perfectly easy, if either should have thought best, to insert some words of limitation

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or exclusion, but it was not done. Not only so, but a clause omitted in the revision of 1866 was restored, providing that no "person" not regularly admitted should act as an attorney—a term which necessarily included women, and the insertion of which made it necessary, if the word "persons" as used in the first part of the statute should be held not to include women, to give two entirely different meanings to the same word where occurring twice in the same statute and with regard to the same subject matter.

The object of a revision of the statutes is, that there may be such changes made in them as the changes in political and social matters may demand, and where no changes are made it is to be presumed that the legislature is satisfied with it in its present form. And where some changes are made in a particular statute, and other parts of it are left unchanged, there is the more reason for the inference, from this evidence that the matter of changing the statute was especially considered, that the parts unchanged express the legislative will of to-day, rather than that of perhaps a hundred years ago, when it was originally enacted.

But this statute, in the revision of 1875, is placed immediately after another with regard to the appointment of commissioners of the Superior Court, the necessary construction of which, we think, throws light upon the construction of the statute in question. That act was passed in 1855, after women had begun, with general acceptance, to occupy a greatly enlarged field of industry, and some professional and even public positions; and it has been held by the Superior Court, very properly, we think, as applying to women, a woman having three years ago been appointed a commissioner under it. Its language is as follows:—"The Superior Court in any county may appoint any number of persons in such county to be commissioners of the Superior Court, who, when sworn, may sign writs and subpœnas, take recognizances, administer oaths and take depositions and the acknowledgment of deeds, and shall hold office for two years from their appointment." Here the very language is used which is used in the statute

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with regard to attorneys. In one it is, "any number of persons," in the other, "such persons as are qualified." These two statutes are placed in immediate juxtaposition in the revision of 1875 and deal with kindred subjects, and it is reasonable to presume that the revisers and legislators intended both to receive the same construction. It would seem strange to any common-sense observer that an entirely different meaning should be given to the same word in the two statutes, especially when in giving the narrower meaning to the word in the statute with regard to attorneys, we are compelled to give it a different meaning from that which the same word requires in the next line of the same statute.

We are not to forget that all statutes are to be construed, as far as possible, in favor of equality of rights. All restrictions upon human liberty, all claims for special privileges, are to be regarded as having the presumption of law against them, and as standing upon their defense, and can be sustained, if at all by valid legislation, only by the clear expression or clear implication of the law.

We have some noteworthy illustrations of the recognition of women as eligible or appointable to office under statutes of which the language is merely general. Thus, women are appointed in all parts of the country as postmasters. The act of Congress of 1825 was the first one conferring upon the postmaster-general the power of appointing postmasters, and it has remained essentially unchanged to the present time. The language of the act is, that "the postmaster-general shall establish post offices and appoint postmasters." Here women are not included except in the general term "postmasters," a term which seems to imply a male person; and no legislation from 1825 down to the present time authorizes the appointment of women, nor is there any reference in terms to women until the revision of 1874, which recognizes the fact that women had already been appointed, in providing that "the bond of any married woman who may be appointed postmaster shall be binding on her and her sureties." Some of the higher grades of postmasters are appointed by the president subject to con-

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firmation by the senate, and such appointments and confirmations have repeatedly been made. The same may be said of pension agents. The acts of Congress on the subject have simply authorized "the president, by and with the advice and consent of the senate, to appoint all pension agents, who shall hold their offices for the term of four years, and shall give bond," etc. At the last session of Congress a married woman in Chicago was appointed for a third term pension agent for the state of Illinois, and the public papers stated that there was not a single vote against her confirmation in the senate. Public opinion is everywhere approving of such appointments. They promote the public interest, which is benefited by every legitimate use of individual ability, while mere justice, which is of interest to all, requires that all have the fullest opportunity for the exercise of their abilities. These cases are the more noteworthy as being cases of public offices to which the incumbent is appointed for a term of years, upon a compensation provided by law, and in which he is required to give bond. If an attorney is to be regarded as an officer, it is in a lower sense.

We have had pressed upon us by the counsel opposed to the applicant, the decisions of the courts of Massachusetts, Wisconsin and Illinois, and of the United States Court of Claims, adverse to such an application. While not prepared to accede to all the general views expressed in those decisions, we do not think it necessary to go into a discussion of them, as we regard our statute, in view of all the considerations affecting its construction, as too clear to admit of any reasonable question as to the interpretation and effect which we ought to give it.

In this opinion CARPENTER and LOOMIS, Js., concurred.

PARDEE, J., (dissenting.) In England women were not admitted to the bar, and this rule of exclusion obtained both in the colonial and our state judicial systems. I think therefore that whenever the legislature has spoken of the

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admission of "persons" to the bar it referred to persons not affected by this rule; and that it is the duty of the court to give effect to the meaning of the statute as thus ascertained; to follow rather than to precede the legislature in declaring that it has changed its mind.

AARON C. GOODMAN vs. THE MERIDEN BRITANNIA COMPANY.

A contract was entered into by the vendor and vendee of certain trade-marks, by which the vendor was to receive \$500 per month, payable monthly in advance, for ten years, with the following provision:— "The payment of said sum shall at all times be dependent upon the vendee being fully secured in the exclusive use of said trade-marks, and if any other party shall establish his right to use either of them said payments shall thereupon cease." The vendee was undisturbed in the exclusive use of the marks and made the monthly payments for five years, when the debt was attached by a creditor of the vendor. Held that the securing of the vendee in the exclusive use of the marks was not a condition precedent of the obligation to make the monthly payments, but that a present indebtedness was created for the whole amount which could be taken by foreign attachment.

The obligation of the vendee to continue to make the monthly payments would of course cease if at any time any other party should establish his right to use the marks.

SCIRE FACIAS upon a process of foreign attachment; brought to the City Court of the city of Hartford and by the appeal of the defendants to the Superior Court for Hartford County, and heard in that court, upon a denial of indebtedness on the part of the defendants, before *Beardsley, J.* The action in which the defendants were garnisheed was brought against William Rogers. The following facts were found by the court.

On March 16th, 1868, the following contract was entered into by the defendants with William Rogers and William Rogers, Jr., the latter being the William Rogers above mentioned:—

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“This agreement made and concluded this 16th day of March, 1868, by and between the Meriden Britannia Company, a joint stock corporation, organized and existing under the laws of the state of Connecticut relating to joint stock corporations, and located at Meriden, party of the first part, and William Rogers and William Rogers, Jr., both of Hartford, Connecticut, parties of the second part, witnesseth—

“That the party of the first part, in consideration of the promises, covenants and agreements of the parties of the second part herein contained, hereby promises, covenants and agrees, to and with said parties of the second part, to pay the said parties of the second part jointly, or to the survivor of them, in the case of the death of either of them, the sum of five hundred dollars per month, payable in advance each month, for the period of one hundred and twenty months, commencing on the 20th day of March, 1868.

“In consideration of said promise and agreement of said party of the first part, said parties of the second part do for themselves both jointly and severally covenant, promise and agree with said party of the first part, as follows, to wit:

“1st. That they will, and each of them will, during the period aforesaid, use the influence they have in the market to secure trade for said party of the first part in the articles of silver-plated forks and spoons and other silver-plated ware.

“2d. That said party of the first part shall have and enjoy the sole and exclusive right to the use of certain trade-marks heretofore used by the parties of the second part, to wit: ‘‡ Wm. Rogers & Son, A. A.;’ also ‘1847, Rogers Bros. A. I.’ upon all silver-plated forks and spoons made or sold by said parties of the first part after the 20th of March, 1868. And said party of the first part may authorize the use of said trade-marks, or either of them, upon spoons and forks manufactured or sold by other parties, where said party of the first part is to be benefited by the manufacture or sale thereof.

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“That they the said parties of the second part will not, and neither of them shall use either of said trade-marks, during all the period aforesaid, or any other trade-mark or stamp in which the name of Rogers shall be used or form a part thereof, or engage in the business of making spoons or forks, either directly or indirectly.

“That they will not allow, suffer or permit any other person or persons, party or parties, to use, infringe upon, or imitate either of the trade-marks aforesaid, to wit: ‘‡ Wm. Rogers & Son, A. A.,’ and ‘1847, Rogers Brothers, A. I.,’ and that they will not permit, suffer or allow any other person or party, persons or parties, to use the name of the said William Rogers or of the said William Rogers, Jr., upon any stamp or trade-mark upon silver-plated forks and spoons or other plated ware, during the period aforesaid; but that the right of the said party of the first part to the use of the said trade-marks and each of them, and to the use of the name of the said William Rogers, and of said William Rogers, Jr., upon forks and spoons, shall be sole and exclusive to the said party of the first part.

“And whereas certain parties in Hartford, to wit: Thomas Birch and William J. Pierce, are now using the trade-mark, ‘‡ William Rogers & Son, A. A.,’ it is understood that the aforesaid payment is not to commence until said parties of the second part, at their own expense, shall have enjoined said Birch and Pierce, and prevented the use of said trade-mark by them.

“And it is further understood and agreed, that the payment of said sum shall at all times be dependent upon said party of the first part being fully secured and protected in the exclusive use of said trade-marks, and that if any other person or party shall establish their right to use either of the aforesaid trade-marks, said payments shall thereupon cease. But all suits that may be necessary to defend them in the use of said trade-marks, shall be maintained at the expense of said parties of the first part, except only in the case of said Birch and Pierce; and if necessary to use the names of said William Rogers and William Rogers, Jr., or

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either of them, in any suit for the protection of said parties of the first part, the same is hereby authorized.

“Said parties of the second part further promise, covenant and agree that the said William Rogers shall, if able, several times in each year, when required by said party of the first part, visit the large Atlantic cities and solicit orders for said party of the first part, said party of the first part to pay his necessary traveling expenses.

“It is also expected that the said William Rogers, Jr., will also from time to time travel to solicit orders, in which case his necessary traveling expenses shall be paid by said party of the first part, but such services shall not be compulsory, and the omission of either said William Rogers or William Rogers, Jr., to travel shall not invalidate this contract.

“It is also expected that the said William Rogers and William Rogers, Jr., will from time to time render service during said period to said party of the first part at the factory or office of the party of the first part. But an omission to perform the same shall not invalidate this contract. And no compensation additional to the payment of said sum of five hundred dollars per month is to be paid said parties of the second part, or either of them, for any of the services aforesaid.

“The said party of the first part also agrees to withdraw all suits in law or equity now pending against said William Rogers or William Rogers, Jr., for the benefit or in the name of the Meriden Britannia Company, and all actions and grounds of action against them, or either of them, are hereby discharged by said Meriden Britannia Company.”

On the 1st day of January, 1872, the following modification of the contract was made:—

“The Meriden Britannia Company agree to pay the full amount called for by this contract from January 1, 1872, and to waive the performance by the parties of the second part of all conditions in this contract, in relation to the use of the name Rogers by the concern in Hartford, and consider and admit the claims of Wm. Rogers and Wm. Rog-

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ers, Jr., to the full amount of (\$500) five hundred dollars per month, as specified in this contract, to be in full force from January 1, 1872, and thereafter until the expiration of this contract. MERIDEN BRITANNIA Co.,

by H. C. WILCOX, *President.*"

William Rogers, senior, died February 13th 1873. The present plaintiff brought his action against William Rogers, (the William Rogers, Jr., of the foregoing contract,) on the 21st of February, 1873, factorizing the defendants as his debtors. Due service was made on them, and in the action the plaintiff recovered a judgment against Rogers for \$2,749.57 damages, and \$82.25 costs of suit. Demand was duly made on the execution upon the defendants, but they denied all indebtedness to Rogers. There was in fact no indebtedness except such as grew out of the contract mentioned.

Before February 21st, 1873, the defendants had paid to the Rogerses all sums of money falling due to them under the contract.

Upon these facts the court held the defendants to be indebted to William Rogers (defendant in the factorizing suit) and rendered judgment for the plaintiff. The defendants brought the record before this court by a motion in error.

F. Chamberlin and J. P. Platt, for the plaintiffs in error.

A debt due, but payable in the future, may be garnisheed; but all the authorities agree that such claim, in order to be garnishable, must be an absolute debt, which will certainly become payable upon the lapse of time, and that a contingent liability, which may or may not become a debt due, can not be the subject of garnishment. This is the very language of SHAW, C. J., in *Wyman v. Hichborn*, 6 CUSH., 264. The check of a third party, payable to the order of the supposed trustee, is not attachable by trustee process, because there is a possibility that it may never be paid. *Lane v. Felt*, 7 Gray, 491; *Hancock v. Colyer*, 99 Mass., 187; *Knight v. Bowley*, 117 id., 551. "The debt from the

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garnishee to the defendant, in respect to which it is sought to charge the former, must moreover be absolutely payable, at present or in future, and not dependent on any contingency. If the contract between the parties be of such a nature that it is uncertain and contingent whether anything will ever be due by virtue of it, it will not give rise to such a credit as may be attached; for that cannot properly be called a debt, which is not certainly and at all events payable, either at the present or at some future period." Drake on Attachment, § 551.

By the contract of March 16th, 1868, the Rogerses agree:—1st. That for "120 months" they will use their influence in the market to secure trade for the Meriden Britannia Company.—2d. That the company shall enjoy the sole and exclusive right to the use of certain trade-marks, theretofore used by the Rogerses, upon all silver-plated forks and spoons made by the company after March 20th, 1868.—3d. That they will not, during such ten years, use either of said trade-marks, or any other trade-mark, embracing the name of Rogers.—4th. That they will not engage, directly or indirectly, during such period, in the business of making spoons or forks.—5th. That they will not permit any other party to use, infringe or imitate either of said trade-marks.—6th. That they will not allow any other party to use the name of Wm. Rogers or of Wm. Rogers, Jr., upon any stamp, upon silver-plated forks and spoons or other plated ware.—7th. That Wm. Rogers should, if able, visit the large Atlantic cities and solicit orders, several times each year. The Meriden Britannia Company agree, in consideration of these promises:—1st. To pay to the Rogerses jointly, or to the survivor of them, \$500 per month, in advance, for 120 months, from March 20th, 1868.—2d. To withdraw all suits pending against them, and discharge all grounds of action.—3d. That all spoons and forks upon which such trade-marks might be used should be plated with certain prescribed quantities of silver. Both parties agree:—1st. That said payment shall not commence until the Rogerses shall, at their own expense, have enjoined

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Birch and Pierce, (who were then using one of the trade-marks), and prevented its use by them.—2d. *That the payment of \$500 per month in advance shall, at all times, be dependent upon the Meriden Britannia Company being fully secured and protected in the exclusive use of said trade-marks.*—3rd. *That if any other party shall establish its right to use either of said trade-marks, said payments shall thereupon cease.* The contract also recites that the Rogerses are expected to render service during the term at the company's factory or office, and that Wm. Rogers, Jr., is expected to travel to solicit orders, but provides *that the omission of either to travel to solicit orders or perform service at the factory or office, shall not invalidate the contract*, and that no compensation additional to the \$500 per month shall be paid on account of their services.

We submit:

1. That the parties to this contract *expressly* made each monthly payment *contingent*. Such payment was “*at all times to be dependent* upon the Meriden Britannia Company being fully secured and protected in the exclusive use of the trade-marks.” It was, therefore, at all times, *uncertain* whether any future monthly payment would become due, for, at all times, there must have been a possibility that the company would not be fully protected in the exclusive use of the trade-marks. Besides, if any other party established his right to use either of the trade-marks, the payment was thereupon to cease. This was a contingency which must always have been a possibility liable to put an end to the monthly payments.

2. The provisions of the contract clearly indicate that the parties intended substantial performance to be a condition precedent to a continuance of the contract. *Expressio unius est exclusio alterius*; and while the contract states that it is expected that the Rogerses will travel and render service at the factory, it expressly provides that a failure so to do *shall not invalidate the contract*. Manifestly a failure to perform the express agreements *would invalidate it*.

3. The nature of the agreements to be performed by the

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Rogerses, and the general character, spirit and purpose of the entire contract, show that performance by them was intended to be a condition precedent to payment. The object of the contract was to secure to the company a *monopoly* of certain trade-marks. Those trade-marks had derived their value from the Rogerses, and their future worth to the company depended upon their fidelity to their covenants. Without continued performance by them, there would be such a failure of consideration as to bar their right to payment.

4. To hold the company's covenant to pay to be independent of the several covenants of the Rogerses to perform, would manifestly work great injustice. Such construction would make the company liable for the whole \$60,000, although the death of both the Rogerses within a few days after the execution of the contract might make it valueless. Such construction would oblige the company to continue the monthly payments after their failure to secure to it the exclusive use of the trade-marks had removed the consideration of the contract. The importance of such "exclusive use" in the minds of the parties is shown by the provisions, that "payment is not to commence until the use of the trade-marks by certain parties in Hartford shall have been enjoined, at the expense of the Rogerses;" and "that payment shall at all times be dependent upon the company being fully secured and protected in such exclusive use." Such construction would make the company liable for the full \$60,000, although the Rogerses, by a refusal to use their influence to secure trade, by a personal use of the trade-marks, by engaging in the business of making spoons, or by a grant to others, might have violated the letter and spirit of all their covenants, and have made the contract entirely worthless to the company. "The question whether mutual covenants are dependent, is one," says SHAW, C. J., "which has been much agitated in courts of law, and sometimes has been the subject of very subtle distinctions, but it depends upon the intention of the parties and the nature of the respective stipulations, and is to be determined rather from

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the sense of the whole taken together, than upon any particular form of expression." And our own court in the case of *Leonard v. Dyer*, 26 Conn., 172, adopted the rule stated by Chief Justice TINDAL, and approved the same in the late case of *Curtis v. Alvord*, 45 Conn., 571—"that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms must give way." It was undoubtedly the *intention* of the parties to this contract that their mutual covenants should be dependent; that payment should be contingent upon the performance by the Rogerses of their covenants; and that a failure on their part to fully secure to the company such a monopoly of their influence and their trade-marks as this contract provided for, should release it from all obligation to pay. This contingent character of the indebtedness is not in any way changed or affected by the waiver which grows out of a single clause in the contract, and relates to that clause alone.

C. E. Perkins and *F. L. Hungerford*, for the defendant in error, cited *Enos v. Tuttle*, 3 Conn., 27; *Thompson v. Stewart*, id., 183; *Fitch v. Waite*, 5 id., 117; *Todd v. Hall*, 10 id., 544; *Culver v. Parish*, 21 id., 408; *Coburn v. City of Hartford*, 88 id., 290; *Curtis v. Alvord*, 45 id., 569; *Burke v. Whitcomb*, 18 Verm., 421; *Downer v. Topliff*, 19 id., 399; *Downer v. Curtis*, 25 id., 650; *Sargent's Admr. v. Kimball's Admr.*, 87 id., 820; *Dwinel v. Stone*, 30 Maine, 384; *Smith v. Cahoon*, 87 id., 281; *Ricker v. Fairbanks*, 40 id., 43; *Cutter v. Perkins*, 47 id., 557; *Ware v. Gowan*, 65 id., 534; *Webber v. Doran*, 70 id., 140; *Thorndike v. De Wolf*, 6 Pick., 120; *Holbrook v. Waters*, 19 id., 354; *Wheeler v. Bowen*, 20 id., 568; *Boston Bank v. Minot*, 8 Met., 507; 1 *Swift Dig.*, 228; 2 *Parsons on Cont.*, 16.

PARDEE, J. (After stating the case.) The question to be

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answered is, did the defendants owe a debt to William Rogers, Jr., on February 21st, 1873, by virtue of their contract of March 16th, 1868?

The provisions bearing upon this are, that William Rogers and William Rogers, Jr., claiming to be sole owners of a trade-mark in connection with the manufacture of silver-plated ware, in consideration of the sum of \$60,000, payment to be made in one hundred and twenty equal monthly installments in advance, sold to the defendant the sole and exclusive right to use the mark for the term of ten years and promised not to attempt to grant any right to use it during that term to any other person. But inasmuch as both parties knew that by reason of the fact that Birch and Pierce were then in the actual use of it under claim of grant from the vendors, and intended to continue such use, the latter could not put the vendee in possession of the right sold, it was made a condition precedent to the existence of any debt that the vendors should cause Birch and Pierce to be placed under permanent injunction. It was also agreed that if at any time during the term any person should prove in a judicial proceeding instituted for that purpose that the vendors were not at the time of the execution of the contract the owners of the right attempted to be conveyed, no installments should thereafter become payable. This provision does no more for the defendant than the law would have done in its absence; and these two possibilities, namely, that a vendor may not have title to the thing sold, although he has and delivers possession, and that he may fraudulently attempt to sell to *A* that which he had previously sold and delivered to *B*, attend every contract of sale; and if permitted in this, would in every instance of payment deferred prevent the existence of an attachable debt; and this in cases in which payment is to be made once for all, as well as in those where it is to be made in installments; in cases where the evidence is in the form of a note negotiable, or of a charge on book, as well as in those where the promise rests in parol. But they are neither of them, as a matter of legal necessity, a condition

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precedent to the existence of indebtedness for the price of property sold and delivered.

Moreover, in this case the parties made a sharply defined distinction between the certainty that the grantors could not deliver anything of value under the contract until Birch and Pierce should be placed under injunction, and the bare possibilities either that some person of whom the defendant had neither knowledge nor suspicion should at some time be able to prove himself the owner of the mark, or that the vendors would fraudulently undertake to sell to another that which they had previously sold and delivered to it. Until the defendant was made sure that no harm could come to it from the claim of Birch and Pierce it would neither pay nor come under obligation to pay; being certified upon that point it in 1872 withdrew this condition precedent and began to pay. Having possession of the exclusive right purchased, it established the existence of the debt for the price in its entirety by beginning and continuing to pay in advance installments thereon as fractions of a whole. The possibility of failure of title then existed and co-existed with the recurring payments to the end of the term; but the defendant did not by reason thereof require the vendors, nor did they permit it, to postpone the payment until the expiration of the term; did not require them, nor did they permit it, to postpone for a day even; did not require, nor did they furnish, security for the return of payments made. It paid each installment, not as an independent debt; not as the price in advance of the use of the mark for an isolated month; but as a constituent part of a debt for the gross sum of \$60,000 for its use for a term of ten years, and as such the vendors received it. The defendant knowingly and intentionally assumed the risk of promising that its debt should be constantly and regularly diminished as the term wore away, regardless of these possibilities. Evidently it was satisfied with this measure of defence against them, namely, if either of them should ripen into a certainty, that fact should be its protection against the demand for further payments.

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The question whether either of the possibilities referred to is to be regarded as a condition precedent or as one subsequent is to be determined by discovering the intent of the parties; to be found in what they have written, interpreted in the light of what they have done. There can be no more convincing evidence that a man believes that he owes a debt than his voluntary payment; no more convincing evidence that he does not regard a given possibility as a condition precedent to his becoming indebted than his intentional and persistent disregard of it in his voluntary payment of installments while it exists; no more convincing evidence that a man believes that a debt is due to him than the reception of installments upon it.

We think that when the trustee process was served upon the defendant it was indebted to William Rogers in the unpaid balance of \$60,000. Of course the condition, as a condition subsequent, still follows the indebtedness, and if at any time the defendant should lose the exclusive use of the trade-mark through the establishment of a right to it in some other party, its obligation to continue the payments would cease.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

THE BOSTON & NEW YORK AIR LINE RAILROAD COMPANY *vs.* OWEN V. COFFIN AND OTHERS.

The N. H., M. & W. Railroad Company, organized under a charter which authorized it to take or purchase and hold such real estate as might be necessary or convenient for the construction and operation of the road, made in 1869, under authority of an act of the legislature, a mortgage to the treasurer of the state to secure an issue of bonds to the amount of \$3,000,000, which was recorded, as required by the act, in the office of the secretary of the state; the property mortgaged being described as "all the railroad of said company as the same is now or may be hereafter located or constructed, and all the lands that are or may be included

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in the location of the road or required by said company for the purposes of the railroad, with all property, real or personal, which now belongs or may hereafter belong to said company and be used as a part of the railroad or be appurtenant thereto or necessary for its construction or operation, and all the property, rights and franchises of said company under its charter." After the execution of the mortgage the president of the company purchased with the funds of the company sundry pieces of land for the track of the road, in several instances buying more than was needed with the intention of disposing of the surplus for the benefit of the company and thus obtaining the necessary lands at less cost, all the deeds being taken in such cases in his private name and that of *O*, the treasurer of the company, as joint tenants, for convenience in making conveyances. In 1870 the president and treasurer, with the approval of the company, mortgaged a portion of these lands, lying outside of the lay-out of the road, to *C*, to secure him for advances made for the road. *C* soon after made further advances upon the promise of the president that all the lands of the company except those used for the purposes of the road should be conveyed to him free from incumbrance as security. In 1872, the president of the road having died, *O*, the treasurer, under a vote of the directors, conveyed to *C* sundry other lands of the same character, which had been taken by the president and himself, intending to convey all that were so held for the company except such parts as fell within the lay-out of the road; but by mistake the draftsman omitted four parcels. In 1875, under statute regulations, the treasurer of the state foreclosed the mortgage of 1869 and conveyed the property of the railroad company to the plaintiffs, a newly organized corporation. In the foreclosure proceedings *C* was not made a party. In a suit brought against *C*, and certain parties who held under him, and against *O*, to compel *O* to convey to the plaintiffs the lands still standing in his name, and for a foreclosure of the other defendants, it was held—

1. That lands purchased by the railroad company outside of the lay-out of the road, and not needed for the construction or use of the road, were not covered by the mortgage.
2. That lands purchased after the mortgage was made, that were needed for and used by the road, passed by the mortgage, although the legal title was in the president and treasurer in their private names, they having been procured with the funds of the company and being held in trust for it, and that the mortgage of them was good against *C* and his grantees; the entire lay-out of the road being recorded under the charter in the office of the secretary of the state. (One judge dissenting.)
3. That the lands omitted by mistake in the deed of *O* to *C*, so far as they lay outside of the lay-out of the road and were not needed for its use, could be decreed to be conveyed by *O* to *C*.
4. That the plaintiff could not maintain a suit for a foreclosure against *C* and his grantees, so far as their interests were subject to the mortgage made by the railroad company, but that the suit could be brought only by the treasurer of the state.
5. That evidence was admissible of the representations and promises of the president of the company to *C*, under which the latter had made

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advances to the company relying on a conveyance of the lands as security.

SUIT for the conveyance of certain lands and for the foreclosure of a mortgage; brought to the Superior Court in Middlesex County. The defendants were O. V. Coffin, Allyn M. Colegrove, Lucia C. Birdsey, Sarah H. Colegrove and Allyn M. Colegrove, administrator of the estate of Elihu H. Birdsey. Facts found and case reserved for advice. The case is sufficiently stated in the opinion.

S. E. Baldwin, for the plaintiffs.

R. G. Pike, for the defendant A. M. Colegrove.

D. Chadwick and *S. A. Robinson*, for the defendants L. C. Birdsey, S. H. Colegrove, and A. M. Colegrove, administrator.

PARK, C. J. The principal question in this case is, whether the mortgage of the New Haven, Middletown & Willimantic Railroad Company to the treasurer of the state, made on the 31st of May, 1869, to secure the bonds of the company to the amount of \$3,000,000, included such portion of the lands in question as were not necessary or convenient for railroad purposes.

The property mortgaged is thus described in the mortgage deed:—"All and singular the railroad of the said party of the first part, from the city of New Haven to the village of Willimantic, in the state of Connecticut, as the same is now or may be hereafter located, constructed or improved; and all the roadway and lands that are or may be included in the location of said railroad or acquired by said company for the purpose of said railroad, within the several points aforesaid; with all and singular the railways, rails, bridges, fences, station-houses, depots, shops, buildings, structures, tools, cars, engines, equipments, machinery, fuel, materials, privileges, appendages, appurtenances and property, real and personal, which now belong, or may hereafter

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belong, to the said company, and be used as a part of the said railroad, or be appurtenant thereto, or necessary for the construction, operation or security thereof; and also all the property, rights and franchises of the said company under its charter and every part thereof; together with the tolls, income, issues, and profits thereof, and all rights to receive the same, and everything necessary for the completion and operation of the road."

It will be observed that the description of the lands mortgaged is in almost every instance qualified by some one of the following phrases—"that may be included in the location of said railroad"—"used as a part of said railroad"—"appurtenant thereto"—"necessary for the construction, operation or security thereof"—"necessary for the completion and operation of the road." If the mortgage was intended to include all the lands of the railroad company, whether they were necessary for railroad purposes or not, it is strange that these qualifications should have been made. But the plaintiffs make the claim that the phrases, "lands acquired by the said company for the purposes of said railroad," and "all the property of the said company under its charter and every part thereof," were intended to be without qualification, and to include all the lands owned by the railroad company. But we think the context, at the places where the phrases relied upon are found, clearly shows that they are subject to the same qualification that is applied to other property mentioned, and that they were intended to be confined in their application to what was prospectively necessary and convenient for the construction and future operation of the railroad. The construction and operation of the road were the objects to be accomplished, and lands "acquired for the purposes of the road," were lands acquired for the accomplishment of these objects, and must be lands necessary and convenient for such construction and operation. Lands purchased and sold at a profit, although the profit might be expended in the construction of the road, were never intended to be embraced by the phrase, "acquired by the company for the purposes of the railroad."

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The other phrase, "all the property of the said company under its charter," is found intimately connected with the phrase "and everything necessary for the completion and operation of the road." These expressions are brought together in the same sentence, and it would be strange if the former should be more comprehensive than the latter, when the latter is a sweeping clause, evidently used by the draftsman to include everything intended to be conveyed which possibly the previous language might not include.

Again, the case finds that the railroad company in procuring their right of way considered it advisable, as a matter of economy, to purchase in many instances larger tracts of land than were required by necessity or convenience for such way, and to sell the surplus. It was thought that the cost of their right of way through such lands would be lessened by it. Nearly all the lands in question are included in the surplus of such purchases. The case further finds that the bonds, which the mortgage was given to secure, would have twenty years to run. It would seem therefore unreasonable to suppose that lands, purchased for a temporary purpose, would be included in a mortgage that was to run so long.

Again, the company had no power under their charter to purchase and permanently hold lands not required by necessity or convenient for the purposes of the railroad. The language of the charter upon this point is as follows:—"And said corporation is hereby vested with all powers, privileges and immunities, which are or may be necessary to carry into effect the purposes and objects of this act as herein set forth. * * And shall have power to purchase, receive and hold such real estate, in fee simple or otherwise, as may be necessary or convenient, to accomplish the purposes of this act." The object and purposes of the act are thus stated:—"To locate, construct, maintain, complete and operate a single, double or treble railway or railroad, from some suitable point in the city of New Haven, * * to some suitable point in the village of Willimantic." Such lands, therefore, as were "necessary or convenient" for the

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location of the railroad and all its appurtenances they had the right by their charter to purchase or take in order to locate, construct, maintain, complete and operate a railroad between the points designated. It will be observed that the right of the company to purchase is limited to such lands as they have the right to take for railroad purposes; and certainly they had no right to take surplus lands in order to make their right of way through such lands cost less than it could have been otherwise obtained for. But the claim of the complainants would leave the power of the company to purchase lands unlimited, for if the terms of the charter could be made to embrace lands not "necessary or convenient" for the purposes of the railroad, there would be no limit to the power of the company to make such purchases. We do not mean to say that the company could not purchase land of which a portion was not needed and hold the surplus temporarily, where by so doing they could acquire the right of way through the land more cheaply, intending at the same time to sell or otherwise obtain the value of the surplus lands within a reasonable time, and expend the proceeds in the construction of the road. What we mean to say is that the company had no right under their charter to purchase lands that were not needed, and permanently hold them, as the claim of the plaintiffs under this mortgage would seem to imply. Such being the case, it is reasonable to suppose that the parties to the mortgage in question intended only to give on the one hand and receive on the other what the company could lawfully hold under its charter, and inasmuch as the language of the mortgage can be construed in accordance with such intent, we think it should have such a construction. The words "necessary or convenient," as used in the charter and mortgage, should have a liberal construction, and should include all that has been found to be reasonably necessary or convenient for the successful operation of the road since its construction. But inasmuch as some parts of the lands in question have been found to be unnecessary and not required by convenience for such purposes, we think those parts ~~are~~ not included in the mortgage.

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The following cases bear upon the question we have been considering. *Raymond v. Clark*, 46 Conn., 129; *Walsh v. Barton*, 24 Ohio St., 28; *Eldridge v. Smith*, 34 Verm., 484; *Shamokin Valley R. R. Co. v. Livermore*, 47 Penn. St., 465; *Dinsmore v. Racine & Miss. R. R. Co.*, 12 Wis., 649; *Youngman v. Elmira & Williamsport R. R. Co.*, 65 Penn. St., 278; 1 Jones on Mortgages, sec. 156.

It appears by the finding that "the plaintiffs and their grantors have used for railroad purposes portions of the lands in controversy that are outside of the location of the railroad, and the plaintiffs have been in the possession of such portions for such uses. Their freight depot is partly on such lands." We understand this to mean that such lands were necessary or convenient for railroad purposes; and if so they were covered by the railroad mortgage.

It further appears in the case that the mortgage and deeds from Coffin to Colegrove included all the lands described therein, "except such portions thereof as were within the lay-out or location of the railroad." It follows that the railroad mortgage included some lands that the Colegrove mortgage and deeds likewise included; and so far the Colegrove mortgage and deeds became a subsequent incumbrance upon the property.

It may be said that the railroad company never had the legal title to the lands thus covered by these deeds, and that therefore the railroad mortgage is ineffectual as against the defendants. These lands were as necessary for the successful operation of the railroad as the land covered by the lay-out. It is manifest that the road could not be operated without depots and side-tracks. They are as essential as the road-bed itself. Now it is conceded that the railroad mortgage is effectual to secure the bondholders so far as the lay-out of the railroad over the lands in controversy is concerned, and if so, what good reason can be given why it is not equally effectual so far as the land covered by the railroad depot is concerned? The title to both was taken in the name of Lyman, the president, and Coffin, the treasurer, for purposes of convenience in the sale of lands of which

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they formed a part. The railroad company were the equitable owners, and agreeably to their charter, mortgaged the land covered by the lay-out of the road, and other lands necessary and convenient for the construction and operation of the road. And agreeably to their charter the deed was recorded in the office of the secretary of the state, in order to give constructive notice to the defendants, and all others interested, that the land now under consideration was included in the mortgage deed. The case was exceptional. The recording of the deed in the office of the secretary had the same effect that it would have had if the deed had been recorded in the records of all the towns along the line of the road. Colegrove knew that the lands were purchased by the company for railroad purposes so far as they were essential. He knew, or ought to have known, the charter of the company and what powers it conferred. He had constructive notice of the deed, and was in fault that he had not actual knowledge. He had all the means of knowledge that the nature of the case could furnish, or that the charter deemed important. The railroad company were the real owners of these lands, and no one would question their ability to mortgage them, although they never had the legal title. The law would compel a transfer of such title, at any time, to the grantee.

But, it is said, that the railroad company, by a vote of its directors, authorized the deeds to Colegrove. How does that affect the question? Can a grantor, after he has conveyed property, convey it again so as to affect the former grantee? Certainly not. We see no reason why the railroad mortgage is not effectual against the defendants so far as it covers these lands.

It appears that the defendants, to whom the property was conveyed by Colegrove, were not made parties to the foreclosure of the railroad mortgage, and consequently they were not affected by it; and hence arises the question, whether the prayer of the complaint can be granted, which asks for a foreclosure of whatever interest the defendants may be found to have in these lands. The charter of the

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New Haven, Middletown & Willimantic Railroad Company specially authorized the company to issue its bonds to a certain amount, and prescribed the manner in which they should be executed and recorded, and the time when they should be issued. It further authorized the company in a certain specified mode to secure its bonds "by a mortgage of its railroad, and all its property, rights and franchises under its charter, or any part thereof, by deed duly executed by its president under the corporate seal of the company, to the treasurer of the state and his successors in office, in trust for the holders of the bonds; which deed shall be recorded in the office of the secretary of this state."

The General Statutes on the subject prescribed the duties of the treasurer in the premises, and under what circumstances foreclosure proceedings should be brought. The charter of the plaintiffs' company directed the treasurer to convey to the plaintiffs in fee simple all his right, title and interest in the mortgage property, after the same should have become foreclosed, in the following language:— "Whenever the title of the trustee under the first mortgage shall become absolute by the foreclosure of the mortgage premises, he shall * * convey to said company [the plaintiffs] and its successors and assigns, in fee simple, all his then right, title and interest in and to said mortgage premises."

Thus it appears that every step in the proceedings from the giving of the mortgage down to the conveyance of the property to the plaintiffs was prescribed by the legislature. The subject was of course one to be regulated by legislation; and the legislature having prescribed a certain course to be pursued, impliedly denied the right to pursue any other. The treasurer pursued that course, and foreclosed nearly all the property conveyed to him by the mortgage; but by oversight failed to accomplish the object so far as the small portion was concerned on which these defendants hold a second mortgage, by omitting to make them parties to the proceeding; and the question is, can the plaintiffs do what the treasurer failed to do? or does that duty still

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remain with the treasurer? If the plaintiffs can sustain a suit of foreclosure for a part of the property mortgaged to the treasurer, they could have done so for the whole, and the action of the treasurer in the matter was wholly unnecessary. The treasurer was made the trustee of the property for the bondholders; and that trusteeship could not be otherwise discharged than by pursuing the course prescribed by the legislature. That course was the only one provided for a transfer of the property from the one company to the other, to wit—a foreclosure of the property by the treasurer, and a conveyance of it by him in fee simple to the plaintiffs, after the title had become absolute in him. We think the treasurer is still the only one who can sustain a suit for a foreclosure. He has performed a part of his duty; let his successor perform the remainder, if it is to be performed at all. A majority of the court are of the opinion that the prayer of the complaint in this regard cannot be granted.

Can the prayer be granted which asks a decree for the conveyance to the plaintiffs of the title to the lands remaining in the name of Coffin, the secretary of the New Haven, Middletown & Willimantic Railroad Company?

The facts in this part of the case are substantially as follows. The titles to the lands in controversy were taken in the name of the president and secretary of the last named company in order that they might more easily be disposed of and the proceeds expended in the construction of the railroad, the title being taken by them as joint tenants. The defendant Colegrove loaned the company large sums of money to be so expended, and a mortgage of that portion of these lands lying without the location of the railroad was made to him to secure the loans. Colegrove for a valuable consideration assigned the mortgage note to the defendant Birdsey, who received the same in good faith, and had no knowledge that the railroad company or the treasurer claimed any interest in the lands described in the mortgage deed. Afterwards Colegrove loaned other large sums to the company to be expended in the construc-

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tion of the road, on a representation made by the president of the company that the title to these lands was taken in his name and that of Coffin, the secretary, in order that they might dispose of such portions of them as lay without the location of the railroad, and use the avails for railroad purposes; that the lands were free from all incumbrance, and that they should be conveyed to him as security for the advances he had made or should thereafter make to the company, with the right on his part to sell the lands and from the avails pay the amount of his claims. Induced by these representations Colegrove afterwards made the advancements stated, and deeds were given of the lands, with the exception of what was contained in the lay-out of the railroad, to secure them. Colegrove took the deeds in good faith, without any knowledge that the railroad company or the treasurer of the state claimed any interest in the lands. He afterwards, for a valuable consideration, conveyed all his right, title and interest in the lands to the defendant Birdsey, who likewise received the same in good faith without any knowledge that the railroad company or the treasurer claimed any interest in them. The grantor of the deeds intended to convey and supposed that he was conveying to Colegrove all the lands in controversy outside of the location of the railroad, but by the mistake of the draftsman of the deeds four pieces of land, designated as Nos. 1, 2, 3 and 4, were omitted. Coffin, the grantor, had title not only to the lands conveyed and to the four pieces omitted, but also to that portion adjoining them which is covered by the lay-out or location of the railroad. The lands covered by the lay-out are not in controversy in this suit for the defendants have no interest in them. It does not appear where the four pieces of land omitted are located. If any part of them are within the location of the railroad, then we are all of the opinion that Coffin should convey such portion to the plaintiffs, together with all other lands standing in his name which are covered by the location or lay-out of the railroad. And we are all further of the opinion that the portion which lies without the railroad

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mortgage should be conveyed in fee simple by Coffin to the defendant Colegrove, in trust for the defendants Lucy C. Birdsey and Sarah H. Colegrove. And it is the opinion of us all that all the lands in controversy outside of the mortgage, are the absolute property of the defendants.

If any part of the four omitted pieces are covered by the mortgage and lie without the location or lay-out of the railroad, then a majority of the court are of opinion that Coffin should convey such portion to the defendant Colegrove, in trust for the defendants Lucy C. Birdsey and Sarah H. Colegrove, according to the agreement under which Colegrove made his advancements to the railroad company.

The plaintiffs claim that the defendants have not laid the foundation for affirmative relief by filing a sufficient cross-complaint to that effect. But the defendants have filed what has all the essential elements of a cross-complaint. It states all the facts, and asks a conveyance of the lands remaining in the name of Coffin. We think it is sufficient.

In regard to the testimony which was objected to on the trial before the committee and the court below, we all think it was properly received for the purposes claimed. The defendants' answer and cross-complaint allege the facts, which the evidence tended to prove. It is there set forth that the defendant Colegrove loaned large sums of money to the railroad company in consequence of the promises of the president of the company that he should have security for the loans in deeds of the lands, to which the president then held the legal title as a joint tenant with Coffin, the secretary of the company. And it is further set forth, that after the death of the president Coffin attempted to consummate the agreement by a conveyance of the lands, and supposed he had done so, but by mistake failed to accomplish the object. We think these allegations admitted of being proved. It appears that the legal title to these lands was taken in the names of the president and secretary that they might more easily be disposed of and the proceeds expended in the construction of the railroad. They were

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so disposed of, and the proceeds were so expended, and the company had the benefit of them. We think the evidence was properly admitted.

We therefore advise the Superior Court, on a further hearing of the case as to what lands were mortgaged to secure the bondholders, and as to the location of the four pieces of land omitted by mistake from the mortgage to Colegrove, to render judgment in accordance with the foregoing opinion.

In this opinion PARDEE and LOOMIS, Js., concurred.

CARPENTER, J., (dissenting.) I cannot assent to one position taken by the court in this case, and that is that the first mortgage of the railroad company embraced and conveyed a title to land, the title to which the railroad company never acquired, and never had any right or interest in, except such right or interest as may have arisen from the fact that the company possessed and used the land for railroad purposes, in connection with the further fact that it was purchased with funds of the company.

In the descriptive part of the deed we find this language:—"And all the roadway and lands that are, or may be, included in the location of said railroad, or acquired by the said company for the purposes of said railroad, * * and property, real and personal, which now belong, or may at any time hereafter belong to said company, and be used as a part of said railroad, or be appurtenant thereto, or necessary for the construction, operation or security thereof."

The language—"acquired by the said company," or "belong to"—manifestly mean something more than the mere naked possession of the land. This is not apt and appropriate language to describe mere occupancy. As ordinarily used it clearly imports a title of some kind. If it does not mean that here it might have been entirely omitted, as the following clause clearly denotes a possession.

It is a startling proposition that a railroad company may insert in its mortgage such language, and that it carries to

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the bondholders any land which the company may at any time thereafter use rightfully or wrongfully for railroad purposes.

The charter authorized the company to secure its "bonds by a mortgage of its railroad and all its property." Vol. 6, Special Laws, p. 288. The language of the general statutes is the same. Rev. Statutes, 1866, p. 195, sec. 511. Thus the power conferred was limited in terms to its own property. If therefore the company had in so many words mortgaged all the real estate which it might at any time possess, leaving out the other qualifying words relating to title, such a provision would have been inoperative for want of power. Construing the language of the deed as applying only to property the title to which was at some time in the company, brings the deed within the power conferred. Construing it otherwise leaves the deed without authority; and giving effect to it as thus construed, establishes a principle directly in conflict with our recording system. It is the policy of that system that the title to all land, so far as possible, may be traced by the record. The record should show just what land the company owned and just what they mortgaged.

This mortgage was executed in May, 1869. At that time none of the land in controversy had been acquired; and when it was acquired the deeds were taken to Lyman and Coffin; so that the record shows no title in the company. The only way to show such a title and that the mortgage affected the land, is to show by parol possession and that the land was purchased with the funds of the company.

More than this, the mortgage deed shows no description whatever of the disputed premises. A description of the property conveyed is an essential requisite of a deed. 1 Swift's Digest, 122. An authority however is hardly needed, because a deed without some description of the land would give no information, and a record of such a deed would be worthless.

Land which the company subsequently acquired appeared on the record, and, being aptly described or referred to as

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included in the premises conveyed by the deed, by force of the covenants therein contained, operating by way of an estoppel, vests at once in the trustee. But here there is no title in the company for the covenants in the mortgage deed to operate on.

Again. To give this deed such a construction and such an effect violates not only natural right but the constitution itself. If the land of Mr. Colegrove, or those represented by him, may be taken in this way, the land of any other man and of every other man on the line of the railway may be taken in the same way—may be taken by a mere trespass without compensation and without due process of law, which the constitution expressly prohibits.

Now I am fully aware that the majority of the court do not intend to establish a principle which will lead to such mischievous consequences. If the proposition should be submitted to them—Can a railroad company by the mere occupancy of land for railroad purposes take it from the proprietor and vest it in its mortgagees? they would unhesitatingly answer in the negative. But the serious question is, whether that is not the principle which lies at the foundation of the decision of this point.

The argument is that the company, having through its officers purchased all this land for railroad purposes, and having paid for it with its own funds, has an equitable title to the whole of it, and may use all or any part of it for railroad purposes, and that the part so used necessarily passed by the deed to the trustee and by the foreclosure and conveyance is now vested in the plaintiffs.

Allowing this argument all the force that can possibly be claimed for it, it meets only a part of the objections to which I have adverted. But I submit with deference that the argument is not sound and will not bear close inspection in respect to any one of them. A careful examination of the case will show this to be so.

The argument assumes that the company may take possession of the land at any time and that the effect claimed for it will follow regardless of intervening rights and equities

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acquired by others; an assumption that is wholly inadmissible. When the land was first acquired the company had an undoubted right to take for railroad purposes all that was required; but it could not take a part of it, cause the balance to be sold, and afterwards, in the exercise of the same right, take a part of that which was sold. Having made its election once, it may not make it again to the prejudice of third persons.

Colegrove advanced money to the company upon the credit of this land. On the 15th day of October, 1870, the company was owing him for money so advanced the sum of \$14,500. At the same time it was owing Julius Hotchkiss \$3,500. Lyman and Coffin on that day mortgaged the premises to Colegrove and Hotchkiss to secure those debts. On the 11th day of August, 1871, the directors approved of that mortgage. That mortgage covered all the land in the pieces described outside of the lay-out. On the 29th day of October, 1872, Coffin (Lyman then being dead,) conveyed the equity of redemption to Colegrove, describing all the land outside of the location of the railroad. That conveyance was authorized by a vote of the directors August 11th, 1871.

Thus the entire title, legal and equitable, passed from Coffin and the railroad company and vested in Colegrove, subject to such interest as Hotchkiss had. As Colegrove had then advanced, or did soon after advance, money enough to more than cover the full value of the land, which money the company had and used in the construction of its road, it is impossible for me to discover any flaw in his title or any want of equity.

In July, 1879, he conveyed the premises to Lucia C. Birdsey. How and when was he or his grantee deprived of that title? It is not pretended that the money has ever been refunded; nor is it claimed that the company, the bondholders, or the present plaintiffs, ever acquired any right from Colegrove or Miss Birdsey. The only ground on which it is claimed that any title passed by the mortgage is an equity in the railroad company, which equity, it is

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claimed, is prior in time and in right to the equity of Colegrove.

I have already referred to this position, and said enough perhaps to show that it is not tenable; but as it lies at the foundation of the decision, I propose to examine it a little more in detail. When did the use which was necessary to give effect to the equity begin? And when did the railroad mortgage first take effect upon the land? Certainly not when the mortgage was executed in May, 1869, for the land was not then purchased for the company. Presumptively that use had not commenced October 29th, 1872; for up to that time they were dealing with Colegrove as a purchaser upon the theory that the company had no further use for it. As the record is silent on the subject we have a right to presume that the company acted in good faith with Colegrove and that the use did not commence until after October, 1872. The case then presents this state of things, and brings us to this strange result: In May, 1869, all the railroad property was mortgaged; afterwards the company acquired an interest of some kind in certain land outside of its lay-out; the company sold that interest for its full value, caused the land unincumbered to be conveyed to Colegrove, and used the avails in the construction of the road. The company then entered upon the same land and used it for railroad purposes, and now we are told that that use, because of an equity which once existed but which exists no longer, deprives the grantee of his title and transfers it to the mortgagees. I cannot assent to such a doctrine. I wish to be understood as protesting against it with all the vigor I can command. It will not do to say that the use commenced while the company had an interest in the land, for the record does not show it and we cannot presume it. The presumption is against it. The position of the majority is that it is not material when it commenced. The decision can be vindicated only by taking the broad ground that the effect is the same whenever it commenced. Otherwise they would have directed a finding upon that point.

But I go further. The company never had any interest,

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legal or equitable, in the land, *as such*, in dispute. I am not now speaking of the land included in the lay-out, for we all agree that the plaintiffs are now entitled to that; but by the disputed premises I mean the land outside of the lay-out. The company was not authorized by its charter to acquire the land. Hence the deeds were taken to individuals. It is doubtful whether it had the power to acquire any interest in the land as land. However that may be, it manifestly acquired no such interest. The right was a personal right against Lyman and Coffin—a right to have the lands sold and the avails paid over to the company to be used in the construction of the road. It had the same interest in the land *as such* as a creditor of an insolvent or bankrupt estate has in land belonging to the estate—a right to have it sold and an interest in the avails—a right which from its nature cannot inhere in the land.

Upon every ground therefore I am satisfied that there is no equity which ought to prevail against the legal record title. More than this, the equitable title in its broadest sense is in Colegrove and his grantees.

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THE *AETNA NATIONAL BANK* *vs.* THE *CHARTER OAK* *LIFE INSURANCE COMPANY.*

W, who was president of a life insurance company, chartered with no unusual powers, indorsed in its name a note of a railroad company, of which he was also president, and procured the note discounted at the plaintiff bank, the proceeds being put to the credit of the railroad company. The note was a renewal, the proceeds of the original having been applied to the payment of an overdraft of the railroad company at the bank. *W* had, with the assent of the directors of the insurance company, been the manager of its finances, and had signed and indorsed its paper to a large amount as its president; but it did not appear that he had made any use of the company's name, with the knowledge of the directors, which they considered as binding on the company, except where it was understood that it received the proceeds or the direct benefit of the transaction. Held—1. That the insurance company had

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no power to indorse an accommodation note for a third party. 2. That if it had such power, yet *W*, as its president, had no implied authority from the facts stated to sign its name for such a purpose.

The insurance company held \$76,000 of a million dollars first mortgage bonds of the railroad company, and all its second mortgage bonds, amounting to \$1,250,000, as collateral security for a large indebtedness of the railroad company. The latter had no available funds to pay coupons of its first mortgage bonds that were falling due. The insurance company had before this generally provided for the payment of the coupons by loaning the money to the railroad company; but there existed no agreement on its part to provide for the payment of the coupons now falling due. One *C* was nominally the maker of the note, though it was really the note of the railroad company. *W*, at the time he got the note discounted, said to the officers of the bank that *C* was good, that the railroad company could not then meet its coupons but he hoped it would be able to pay the note when due from earnings of the road, but that if not paid by the maker or the railroad company the insurance company would pay it, that it was for the interest of the insurance company to have the coupons paid promptly to keep up the credit of the bonds, and that it had ample security; and the cashier supposed from this that the discount was virtually for the benefit of the insurance company. Held that these facts were not sufficient to make the indorsement anything else than an accommodation one.

The note was payable to the order of the railroad company and was indorsed by the insurance company before the indorsement of the payee. Held that this form of indorsement under our law was notice that the insurance company was not an indorser for value or in the regular course of business.

No steps had been taken to collect the note of the maker. In this state a blank indorsement by a third party has a definite import, namely, that the indorser will pay the note if, on use of due diligence, it is not collected of the maker.

Our law in this respect is anomalous and often operates to make a different contract from what the parties intended, but it is too well established to be changed except by legislation.

There is no distinction, as to legal effect, between an indorsement by a third person for the better security of the payee, and such an indorsement for the purpose of getting the note discounted at bank.

There was no room for an equitable estoppel against the insurance company; the plaintiffs having had full knowledge of the facts, and having parted with nothing.

Evidence held inadmissible, to show that it was the usage of banks to require all paper discounted to be commercial paper, and all persons indorsing such paper to be bound by their indorsements. Such evidence would be immaterial unless it was intended by it to substitute a contract implied by the usage of banks for that implied by law; and it would not be admissible for that purpose, as the law and not the usage of banks determined the character of that contract.

And held that the testimony of *W* was not admissible for the plaintiffs,

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that when he indorsed the note in the name of the insurance company he intended to assume for it the obligation of an indorser to the bank. The legal effect of the indorsement was not to be controlled by his secret intent.

Held also that an opinion was not admissible as to the effect of the non-payment of the coupons of the first mortgage bonds on the value of the second mortgage bonds. This was a matter to be shown by facts, from which the jury could form an opinion for themselves.

Held also that evidence as to the condition of the insurance company as to solvency at the time the note was discounted, was inadmissible. The matter, as bearing upon the necessity of indorsing the note in order to obtain money, was too remote.

The court had power to require the plaintiffs, if they claimed from the blank indorsement anything different from the contract implied by law, to write over it the contract that they claimed.

Such a requirement is proper in such a case as a means of notifying the adverse party what contract the plaintiff claims to have been made.

ASSUMPSIT on an indorsement of a promissory note by the defendants; brought to the Superior Court in Hartford County, and tried to the court on the general issue before *Calver, J.* The declaration contained four counts, the first describing the defendants as second indorsers, the second as first indorsers, and the third as makers; the fourth set forth the facts attending the transaction as implying a promise to pay the note. The following facts were found by the court.

The note on which the suit was brought was as follows:—

“\$4,500.

HARTFORD, Nov. 1, 1875.

Four months after date I promise to pay to the order of the Connecticut Valley Railroad Company forty-five hundred dollars at the *Etna National Bank*, value received.

OLIVER H. CLARK.”

The note was indorsed as follows:—

“Charter Oak Life Ins. Co.
by J. C. Walkley, President.

“J. C. Walkley.

“Conn. Valley R. R. Co.
by J. C. Walkley, President.”

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Before the trial the court, on motion of the defendants, made an order that the plaintiffs write over the indorsement of the defendants any contract which they claimed, which differed from the contract implied by law. The facts with regard to this order are fully stated in the opinion. The contract written over the indorsement by the plaintiffs under this order is stated in the finding.

The note was executed by Clark as an accommodation note, and by him delivered to Walkley, as president of the railroad company, and he made the indorsements thereon as above stated, for the purpose of getting the note discounted at the plaintiffs' bank, and the plaintiffs thereupon discounted the note on the credit of the indorsements and of the maker.

When the note fell due, March 4th, 1876, it was duly presented to the maker by the plaintiffs at their banking house and payment demanded, but neither the maker nor the railroad company paid it. Due notice of the demand and non-payment was given the defendants.

It was not proved nor claimed by the plaintiffs that they had ever taken any steps to collect the note of the maker, nor that he was not of sufficient ability to pay it when it fell due, nor that it could not have been collected of him by the use of due diligence.

The plaintiffs did not claim that Walkley had any express authority from the defendants to make the indorsement in their name, but claimed that he had an implied authority by having been in the habit of indorsing paper and other obligations, as president of the company; and I find that, from 1871 till after the date of the note in suit, he was the acting business manager of the defendant company, with the knowledge and consent of its directors, and signed and indorsed its notes, checks and other obligations, to a large amount, as its president. But I am unable to find that he had made any signature or indorsement of the name of the company, as its president, to any paper or obligations of any kind, with the knowledge of the company, or of its officers, which they recognized as binding on it, except when it was

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understood that the defendant was to receive the proceeds or direct benefit thereof.

Walkley was president of the railroad company from October 1st, 1869, to April, 1876. He was also president of the defendant company from 1858 to April, 1876.

The plaintiffs claimed the right to prove a special contract by the indorsement different from what is implied by law, and by order of the court, made at the request of the defendants, the following special contract was written over the indorsement:—"On default of payment of the within note according to its tenor, the Charter Oak Life Insurance Company, on due demand and notice of dishonor, promises to pay said note according to its tenor to the *Ætna* National Bank or bearer." But I do not find that such special contract was made, nor any contract different from that implied by law.

By the 11th section of the defendants' charter it is provided that "all policies of insurance or other contracts, authorized by this act, may be made with or without the seal of said corporation, and shall be signed by the president and secretary, and being so signed and executed shall be binding and obligatory upon said corporation according to the true intent and meaning of such policies."

At the time the note above described was executed by Clark, Walkley, as president of the railroad company, and of the defendant company, and also individually, executed and delivered to Clark an agreement in writing to the effect that the note was made for the benefit of the railroad company, and that they would pay it at maturity, and wholly save him from all loss thereon. But I do not find that this agreement was made by Walkley in pursuance of any authority from the defendant company, express or implied, and it was not proved that the plaintiffs had any knowledge of it till long after the note became due.

The note in suit is a renewal in part of one made and executed by Clark, June 29th, 1875, as an accommodation note for five thousand dollars, payable to the order of the Connecticut Valley Railroad Company at the plaintiff bank,

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four months after date, and indorsed precisely in the same way as the present note. At the time the original note was executed, Walkley, as president of the defendant company, as president of the railroad company, and individually, executed and delivered to Clark an agreement of the same tenor with that above described.

The plaintiff bank discounted the note June 30th, 1875, for the accommodation and benefit of the railroad company, although the cashier supposed, from what Walkley said to him at the time, that it was virtually for the benefit of the defendants, and was to be used by the railroad company for payment of the coupons of the first mortgage bonds.

At this time the railroad company had outstanding one thousand first mortgage bonds, bearing date December 31st, 1870, each of the denomination of one thousand dollars, payable thirty years from date, with interest coupons attached at seven per cent., payable on the first day of January and July in each year. These bonds at this time were worth about ninety per cent. The railroad company had also outstanding second mortgage bonds of the nominal value of \$1,250,000; but their real value was not proved.

At this date, June 30th, 1875, the railroad company was largely indebted to the defendants, (how much was not shown,) for which the defendants held all the second mortgage bonds, and had held a large amount of the first mortgage bonds, as collateral security.

In 1871 the defendants borrowed \$230,000 of the Norwich Savings Society, and with the consent of the railroad company pledged \$330,000 of the first mortgage bonds as collateral security therefor. By an arrangement of all the parties all these bonds except seventy-six had been disposed of before June 30th, 1875, and the proceeds applied towards the principal and interest of the loan. The coupons on the seventy-six bonds were not paid either on July 1st, 1875, or January 1st, 1876, and in June, 1876, when the lien was fully paid and settled, were returned to the defendants with the coupons attached.

Prior to June 30th, 1875, the defendants had generally

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provided for the payment of the coupons of the first mortgage bonds by loaning the money to the railroad company. But I do not find that there was any agreement between them and the railroad company to pay the coupons falling due July 1st, 1875.

The railroad company, at this time, had no available funds with which to provide for the payment of the coupons due July 1st, 1875; and the defendants at this time were embarrassed in consequence of the then recent failure of Allen, Stewart & Co., of New York, with which company they had extensive dealings. The coupons due July 1st, 1875, amounted to \$85,000.

The defendants at this date had money on deposit in bank amounting to from \$145,000 to \$148,000, and it was not proved that they had any payments falling due at that time, although their expenses and obligations were very large.

At the time the plaintiffs discounted the five thousand dollar note, June 30th, 1875, Walkley said to the officers of the bank that the maker of the note was good; that the railroad company could not then meet the payment of the coupons falling due July 1st, 1875, yet he hoped it would be able to pay the note at its maturity from earnings of the road, but if not paid either by the maker or the railroad company the defendants would pay it; and that it was for the interest of the defendants to have the coupons paid promptly in order to keep up the value and credit of the bonds, and that the defendants had ample security.

At this time, and for several years previously, the railroad company kept its bank account with the plaintiffs. The defendants had no bank account with the plaintiffs, but kept their account at other banks. The plaintiffs opened no special account with the defendants at the time of discounting the note, and did not agree to pay any coupons with the proceeds of the note, and did not in fact pay any.

At the time this note was discounted the account of the railroad company was overdrawn \$5,086.87. The proceeds of the note were \$4,863.84, and were credited to the general account of the railroad company, leaving still an overdraft

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of \$228.08. Walkley said to the cashier, when informed by him that the note had been discounted, that he might place it to the credit of the railroad company, and that the treasurer of that company would want to check out some money for paying coupons on the first mortgage bonds; and on July 1st, 1875, the railroad company was allowed by the plaintiffs to overdraw its account \$8,359.70. But I do not find that any portion of this over-draft came directly or indirectly into the hands of the defendants.

Coupons to the amount of \$32,340 were paid on the first mortgage bonds July 1st, 1875, of which the plaintiffs furnished \$8,000. I do not find that this payment affected the value of either the first or second mortgage bonds.

During the trial William R. Cone, president of the plaintiff bank, and who was such president at the time the note in suit was discounted, being called by the plaintiffs as a witness, was asked the following question:—"Will you state whether or not the note in suit was discounted by your bank on the credit of the Charter Oak Life Insurance Company?" It had been proved on the trial, and admitted, that when the original note was discounted Mr. Cone was absent in Europe, and had no personal knowledge of what was said or done at that time, and that when the renewal note in suit was discounted, nothing was said except that the new note was a renewal of the old one in part. The defendants objected to the question on the ground that the witness should be allowed to state only what was said or done at or before the time of the discount, and the court sustained the objection.

The plaintiffs also offered to prove by Mr. Cone that it is the custom and usage of banks generally to require all paper discounted by them to be bankable or commercial paper, and all persons indorsing the same to be bound thereby. On objection of the defendants the court excluded the evidence.

The plaintiffs asked Mr. Walkley, who presented the note in suit for discount, to state whether or not, when the note was discounted, it was his purpose to make a contract

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between the insurance company and the bank. The defendants objected to the question on the ground that the witness should be allowed to state only what was said or done at the time of the discount, and that his secret or unexpressed purpose was not admissible. It not being claimed that the purpose was communicated at the time, the court excluded the evidence.

John W. Stedman was called as a witness by the plaintiffs, and after testifying that he was insurance commissioner in 1874, and part of the year 1875, was asked the following question:—"What was the condition of the defendant company, as to solvency, between January and May, 1875?" The defendants objected to the question, on the ground that the witness could not state his mere opinion or the conclusions to which he had come, from the examination he had made of the company, unless accompanied with the facts upon which that conclusion was based. The court sustained the objection.

The plaintiffs asked Walkley the following question:—"Whether or not, when you indorsed the note for the Charter Oak Life Insurance Company, you intended to assume the obligation of an indorser to the bank?" The defendants objected to the question on the ground that the uncommunicated intent of the witness could not avail unless evidenced by what was said or done at the time. It not being claimed that his intent was communicated at the time, the court sustained the objection.

The plaintiffs offered to show by Walkley that the non-payment of the coupons of the first mortgage bonds due July 1st, 1875, would have greatly diminished the value of these bonds and would have rendered the second mortgage bonds of little or no value. The defendants objected to this question on the ground that it called for the opinion of the witness, who did not profess to be an expert in such matters, and who claimed no special knowledge or means of judging of such probable effect. The court sustained the objection.

The plaintiffs offered Mr. Cone, the president of the bank,

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to show that Samuel H. White, secretary and treasurer, and a director of the defendant company, after the note in suit was given, and before it fell due, said to him as such president, that the indorsement of the note by Walkley as president, was a binding obligation on the defendant company, and promised that it should be paid by the company when it fell due. It was proved and admitted that at the time the original and renewal notes were discounted White was absent in Europe, and it was not proved or claimed that he had any personal knowledge of the circumstances under which the discounts were made. On objection of the defendants that it did not appear that White had any authority to bind them by his admissions, the court excluded the evidence.

The plaintiffs claimed, as a matter of law, that on the facts found the defendants were estopped to assert that the contract was *ultra vires*, and that Walkley had no authority to make the indorsement, but the court did not so rule.

Upon these facts the court rendered judgment for the defendants. The plaintiffs moved for a new trial for errors in the rulings of the court, and also filed a motion in error.

H. Willey and C. J. Cole, in support of the motions.

1. Mr. Walkley was authorized by the insurance company to make the indorsement on the note, and the act was the act of the company. When one has the actual charge and management of the business of a corporation with the knowledge of the members and directors, this is evidence of his authority, without showing any vote or other corporate act constituting him the agent of the corporation, and the company will be bound by his contracts made on their behalf within the apparent scope of the business thus intrusted to him. *A. & A. on Corp.*, § 283; *Goodwin v. Union Screw Co.*, 34 N. Hamp., 378; *Northern Central Railroad Co. v. Bastian*, 15 Md., 494; *Lester v. Webb*, 1 Allen, 34; *Fay v. Noble*, 12 Cush., 1; *Olcott v. Tioga R. R. Co.*, 27 N. York, 546; *Perry v. Simpson Waterproof Manfg. Co.*, 37 Conn., 584. Corporations may make themselves

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liable on instruments executed in a different mode from that provided in their charter. *Bulkley v. Derby Fishing Co.*, 2 Conn., 252; *White v. Derby Fishing Co.*, id. 260; *Topping v. Bickford*, 4 Allen, 120. White, the secretary and treasurer, was absent in Europe when the note in suit and the original note were given and indorsed, so that there was no person but Walkley who had any pretence of authority to sign notes or make indorsements for the company.

2. The writing on the back of the note, "Charter Oak Life Ins. Co., by J. C. Walkley, Pres.", was an indorsement in the commercial sense, and not a guaranty. The purpose for which the indorsement was made, was not to become a surety for the maker, but "it is found that Walkley made the indorsement for the purpose of getting the note discounted at the plaintiffs' bank, and the plaintiffs thereupon discounted the note on the credit of the indorsements and of the maker. Clark was an accommodation maker; it was so understood and agreed by the railroad company and the insurance company, they giving him their written guaranty to pay the note at maturity. They could not have understood that they contracted to pay the note only after the payee or holder had exercised diligence to collect the same of the maker. The law of Connecticut is unquestionably settled, that "the indorsement in blank of a negotiable note by a third person for the *better security of the payee*, implies a contract on the part of the indorser that the note is due and payable according to its tenor, that the maker shall be of ability to pay it when it comes to maturity, and that it is collectible by the use of due diligence. *Perkins v. Catlin*, 11 Conn., 228; *Lafflin v. Pomeroy*, id., 445; *Ransom v. Sherwood*, 26 id., 441. All these are cases where the indorsement was made, not for the purpose of getting the note discounted at bank, but as surety for the maker for the better security of the payee. In *Case v. Spaulding*, 24 Conn., 578, the court held that the contract could be shown, and that a name on the back of the note written before the payee could be shown not to have been placed

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there as surety for the payee, but to enable the payee to obtain the note to be discounted at bank, and so he was treated as indorser and not as guarantor. Both the defendants and the plaintiffs understood it to be an indorsement in the commercial sense, and treated it as such. There is no law in Connecticut which conflicts with the following rule laid down in *Rey v. Simpson*, 22 How., 341:—"If the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as second indorser in the commercial sense." See also *Good v. Martin*, 95 U. S. Reps., 90.

3. The insurance company was an indorser for value, not an accommodation indorser. "An accommodation bill is a bill to which the acceptor, drawer, or indorser, as the case may be, has put his name without consideration for the purpose of benefiting or accommodating some other party who is to provide for the bill when due." Byles on Bills, 100. There was a consideration for the indorsement, and the indorser agreed to provide for the note when it became due. The court has found that "the cashier of the plaintiff bank (at the time the original note was discounted) supposed, from what Walkley said to him at the time, that it was virtually for the benefit of defendants, and was to be used by the railroad company for the payment of coupons of the first mortgage bonds." Also that Walkley said at the same time to the officers of the bank, "that the maker of the note was good, that the railroad company could not then meet the payment of the coupons falling due July 1st, 1875, yet he hoped it would be able to pay the note at its maturity from earnings of the road; but if not paid either by the maker or railroad company the defendants would pay it; that it was for their interest to have the coupons paid promptly in order to maintain the credit of the bonds, and that the defendants had ample security." The insurance company in 1870 and 1871 was doing a large business, and was in receipt of large sums of money from premiums paid.

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It was its right and duty to invest these funds, and it did invest a large amount in the bonds of the Connecticut Valley Railroad; they took a large amount of its first mortgage bonds, and all of its second mortgage bonds, \$1,250,000, in payment of or as security for advances made and to be made to the railroad company. There was no question as to the legal right of the insurance company to invest its funds in this manner, and prior to June 30th, 1875, it had generally provided for the payment of the coupons of the first mortgage bonds by loaning the money to the railroad company. The insurance company found itself from these investments on that day the owners of \$76,000 in first mortgage bonds, and \$1,250,000 in second mortgage bonds, and it was bound to do what a prudent individual would do to protect its interest in these bonds. The interest coupons of the first mortgage bonds (there were \$1,000,000 of these bonds outstanding) were due July 1st, 1875; if not paid it was certain that the first mortgage bonds would decline in value, and the second mortgage bonds become of no value in the market; and if the first mortgage coupons were not paid in six months the treasurer of the state would take possession of the road, and if not paid within the year the road would be foreclosed and the second bonds become entirely worthless. The railroad company had no funds to pay the interest coupons, and the insurance company was embarrassed in consequence of the then recent failure of Allen, Stevens & Co., with which company it had extensive dealings. In these circumstances it could not spare the money to pay the interest, and Walkley, as its president, obtained the accommodation note of Clark, and it was indorsed by the insurance company to procure money at the plaintiff bank to pay the interest, and the money was obtained by means of the indorsement, and was applied to pay the interest, and thereby the value of the bonds was kept up in the market. Would an intelligent business man have done otherwise? And is there anything in the charter of the insurance company, or any law, which would prevent it from protecting

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its property from deterioration and loss. We say then that it was not an accommodation indorsement.

4. The indorsement was not *ultra vires*. A corporation may transact all such business and make all such contracts, where ancillary to its primary business, as may be transacted and made by ordinary individuals under similar circumstances. *Brown v. Winnisimmet Co.*, 11 Allen, 384; *Milledge v. Boston Iron Co.*, 5 Cush., 175; *Converse v. Norwich & N. Y. Transportation Co.*, 33 Conn., 180; *Railroad Co. v. Howard*, 7 Wall., 412; *Thompson v. Lambert*, 44 Iowa, 239.

5. If the indorsement was *ultra vires*, the defendants are estopped from denying their liability. They procured the note to be discounted on the representation that their interest would be promoted thereby, that they would pay it, and that they had ample security; and it was discounted by the plaintiffs in good faith on the credit of their indorsement and representations. *State Board of Agriculture v. Citizens' Street Railway Co.*, 47 Ind., 407; *Zabriskie v. C. C. & C. R. R. Co.*, 23 How., 381; *Madison & C. R. R. Co. v. Norwich Savings So.*, 24 Ind., 457; *Monument Nat. Bk. v. Globe Works*, 101 Mass., 57; *Bissell v. Michigan Southern R. R. Co.*, 22 N. York, 258; *Perry v. Simpson Waterproof Manf. Co.*, 37 Conn., 520; *Oil Creek & C. R. R. Co. v. Penn. Transportation Co.*, 88 Penn. St., 160; *Bradley v. Ballard*, 55 Ill., 413; *Thompson v. Lambert*, 44 Iowa, 239; Pierce on Railroads, 516 to 519, and cases there cited. It is a familiar principle that "where a party has by his declarations or conduct induced another to act in a particular manner, he will not afterwards be permitted to deny the truth of his admission if the consequence would be to work an injury to such other person." *Dezell v. Odell*, 8 Hill, 215; *Fall River Nat. Bank v. Buffington*, 97 Mass., 498.

6. If it should be held that by the peculiar law of Connecticut, (and it would be law different from that of any other state) this was a guaranty and not a commercial indorsement, the plaintiffs will be entitled to recover on the fourth count of the declaration; for it would be a guaranty

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of an *accommodation note*, and there was no obligation on the part of the holder to use diligence to collect it of the maker, for the reason that the guarantor, having agreed with the maker to save him harmless from the payment of the note, can suffer nothing from the laches of the holder in not pursuing his remedy against the maker. Edwards on Bills, 454, 638; *Mechanics Bank v. Griswold*, 7 Wend., 168; *Evans v. Norris*, 1 Ala., 511; *Torrey v. Foss*, 40 Maine, 74, 80; *Sharp v. Bailey*, 9 Barn. & Cress., 44. The liability of the guarantor continues unless he can show that he has sustained prejudice by reason of the failure of the holder to collect of the maker.

7. The orders as to designating the count relied on, and writing the contract claimed over the indorsement, were erroneous. It is the right of a plaintiff to set forth his cause of action in different counts, and the court has no authority to order that he shall designate the count on which he relies; for the purpose of different counts is "to accommodate the statement of the cause as far as may be to the possible state of the proof to be exhibited on the trial, to guard, if possible, against the hazard of the proof's varying materially from the statement of the cause of action, so that if one or more of the several counts should not be adapted to the evidence some other of them may be so." Gould Pl., ch. 4, sec. 4. There is no confusion or uncertainty as to the claims set forth in the different counts of the declaration. The case of *Castle v. Candee*, 16 Conn., 223, differs materially from the present case.

8. The court erred in excluding the testimony of Mr. Cone, president of the plaintiff bank, "that it is the usage of banks generally to require all paper discounted by them to be bankable or commercial paper, and all persons indorsing the same to be bound thereby." He was an expert, qualified to testify to the usage of banks, and it was evidence to show that the *Aetna* Bank understood that the writing on the back of the note was an indorsement in the commercial sense. By showing this, and that Walkley for the insurance company understood and intended it as an indorsement,

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we show that the minds of the parties met and that the contract was a contract of indorsement and not a guaranty. It was admissible because commercial custom and usage govern and control, and the contract is presumed to be made in accordance with the usage. *Yeaton v. Bank of Alexandria*, 5 Cranch, 51; *Renner v. Bank of Columbia*, 9 Wheat., 588; *Mills v. Bank of U. States*, 11 id., 431.

9. The court erred in not admitting the testimony of Mr. Stedman, the insurance commissioner, as to the condition of the insurance company as to solvency, between January and May, 1875. It was excluded on the ground that the witness could not state his mere opinion or conclusions to which he had come from the examination he had made of the company, unless accompanied with the facts upon which that conclusion was based. This ruling would have been correct had he not been an expert, but, being an expert, his testimony was admissible. 1 Greenl. Ev., § 440. This testimony was material.

10. The court erred in excluding the testimony of Mr. Walkley on the question whether he intended to assume for the insurance company the obligation of an indorser to the bank, when he indorsed the note. The question was admissible for the purpose of showing that the defendants, by their president, understood and intended the indorsement to be a commercial indorsement, and not a guaranty. *Thurston v. Cornell*, 38 N. York, 231; *Fisk v. Chester*, 8 Gray, 506; *Skidmore v. Clark*, 47 Conn., 20.

11. The court erred in not permitting Mr. Walkley to testify that the non-payment of the first mortgage coupons due July 1st, would have greatly diminished the value of the first mortgage bonds, and have rendered the second mortgage bonds of little or no value. 1 Greenl. Ev., § 440.

A. P. Hyde and C. E. Gross, contra.

STODDARD, J.* The defendant is a life insurance com-

* In this case Judges ANDREWS and STODDARD, of the Superior Court sat in the places of Judges CARPENTER and PARDEE, who were disqualified by interest.

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pany, with no unusual powers respecting the subject of this action. A judgment is demanded against it grounded upon an indorsement made in its name upon an accommodation note. The note was made by one Oliver H. Clark, for the accommodation of the Connecticut Valley Railroad Company, was made payable to the order of the railroad company and bore the following indorsements:—"The Charter Oak Life Ins. Co., by J. C. Walkley, President." "J. C. Walkley." "The Conn. Valley Railroad Co., by J. C. Walkley, President." The note was discounted by the plaintiff bank and the proceeds placed by the plaintiff, by direction of Walkley, to the credit of the railroad company upon the books of the bank. When the discount of the original note (the note in suit being a renewal,) was made the railroad company had overdrawn its account with the plaintiff, and after applying the proceeds of the discount upon that account there still remained an overdraft of \$223.03.

It is not claimed by the plaintiff that there is any express authority in the charter of the defendant to authorize the use of its name by way of accommodation indorsement to pay the debts or to raise money for the use of the railroad company, nor that the indorsement in question was made by any express authority of the board of directors of the defendant corporation. Of course it is entirely clear that the Charter Oak Life Insurance Company was not chartered to pay the debts, or to raise money for the use, of the Connecticut Valley Railroad Company, and that any use of its name by any agent by way of accommodation indorsement to that end is wholly unwarrantable, illegal, and *ultra vires*. The plaintiff having discounted such accommodation paper, and appropriated the proceeds to the payment of a pre-existing indebtedness of the railroad company, must hold the indorsement in question subject to all the ordinary limitations upon the power of an agent of such a corporation to use the name of the principal.

Two considerations are urged by the plaintiff to avoid the application of that salutary principle which forbids an

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agent of a corporation to use its property for ends, purposes and objects foreign to the intent of the incorporating act.

First, it is contended that the indorsement of the defendant was made by a person having general authority to use the name of the defendant corporation by way of indorsement without restriction; secondly, that the indorsement in question was not an accommodation indorsement, but was for value and in regular course of business.

Relative to the first contention, the case states that the indorsement was made by J. C. Walkley, who was president of the life insurance company from 1853 and of the railroad company from 1869, to April, 1876, and that "the plaintiff did not claim that Walkley had any express authority from the defendant to make the indorsement as president of the defendant company, but claimed that he had an implied authority by having been in the habit of indorsing paper and other obligations as president of that company; and from 1871 till after the date of the note in suit, he was the acting business manager of the defendant company, with the knowledge and consent of its directors, and signed and indorsed notes, checks and other obligations of the defendant to a large amount as its president. But the court is unable to find that he had made any signature or indorsement of the name of the company, as its president, to any paper or obligations of any kind with the knowledge of the defendant company or of its officers, which they recognized as binding on it, except when it was understood that the defendant was to receive the proceeds or direct benefit thereof." This finding of the court below disposes of this claim of the plaintiff. As president and general manager of the defendant corporation there is nothing in his acts or otherwise to show that Walkley was invested with power to use the name of the defendant except to promote the purposes of its creation and in regular course of its business. Being permitted to sign and indorse the defendant's name upon paper in cases where it "was to receive the proceeds or direct benefit thereof," does not empower such agent to indorse accommodation paper to pay the debts of a third

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party. *Perry v. Simpson Waterproof Manf. Co.*, 37 Conn., 534; *Swazey v. Union Manf. Co.*, 42 id., 559.

It is also said by the plaintiff that this indorsement was for value, in the regular course of business, and therefore that the act of Walkley in making the indorsement was authorized. And in this relation it is found that the defendant held the amount of \$76,000 of an issue of a million dollars of first mortgage bonds of the railroad company, and all its second mortgage bonds, amounting to \$1,250,000, as collateral security for a large indebtedness to the defendant from the railroad company; the amount of which indebtedness is not found. The interest coupons of the first mortgage bonds were due July 1st, 1875; the railroad company at this time had no available funds with which to pay them, and the defendant was embarrassed by the failure of a New York concern with which it had financial dealings. Prior to June 30th, 1875, the defendant had generally provided for the payment of the coupons by loaning the railroad company the money, but it is not found that there existed any agreement on the part of the defendant to pay the coupons due July 1st, 1875, or to provide for their payment. Walkley, at the time of the discount of the note, said to the officers of the plaintiff that the maker (Clark) was good; that the railroad company could not then meet the payment of the coupons, but that he hoped it would be able to pay the note at its maturity from earnings of the road, but if not paid, either by the maker or the railroad company, the defendant would pay it; that it was for the interest of the defendant to have the coupons paid promptly in order to keep up and maintain the value and credit of the bonds, and that the defendant had ample security. The cashier of the plaintiff bank supposed from what Walkley said to him at the time the note was discounted, that it was virtually for the benefit of the defendant, and was to be used by the railroad company in payment of interest coupons of the first mortgage bonds. The defendant at the time of this discount had on deposit in bank from \$145,000 to \$148,000 subject to check. The railroad company then and for years

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prior thereto kept its account with the plaintiff; the defendant never had any account with the plaintiff, did not agree to pay any of the coupons, and did not pay any. Under these circumstances, there being no contract by the defendant to pay the debts of the railroad company, the plaintiffs claim that the indorsement in question was not an accommodation undertaking, must be based upon the assumption that the bonded indebtedness of the railroad company had in some other way become actually the debt of the defendant, and that the defendant was bound to pay the coupons, for under the facts disclosed in the finding it certainly was not for the interest of the defendant to pay these coupons. Holding but \$76,000 of the first mortgage bonds as collateral security, there could be no other object in paying the coupons upon the entire issue of a million dollars except to preserve the speculative value of the entire issue. The real value to the defendant of the \$76,000 held by it would be seriously impaired by the payment by it of the coupons due July 1st, 1875, and would have been entirely annihilated by its payment of the coupons due January 1st, 1876. There is nothing to found this claim of the plaintiff's upon, no contract express or implied on the part of the defendant to pay the debts of the railroad company, and no facts in the case to warrant the inference that the payment of these interest coupons would affect the value of the second mortgage bonds directly or indirectly. Indeed it is left doubtful by the finding whether the second mortgage bonds had any value to be protected. It does not appear that they had any value whatever. And without further touching the question of the power of this defendant, chartered for a special purpose, and holding its funds and property in trust for a particular object, to assume as principal debtor the payment of interest coupons to the extent of seventy thousand dollars a year for the purpose of protecting the market value of bonds held as collateral security for an indefinite and unascertained sum, is is sufficient to remark that this act of Walkley's was not in the regular course of business and that he had no power to involve the defendant corpora-

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tion in such obligations. Further, it may be noted that when the note was discounted Walkley said to the officers of the plaintiff bank, "that the maker of the note was good, * * that he hoped the railroad company would pay the note at its maturity, * * but that if not paid either by the maker or railroad company the defendant would pay it." Here is a direct, unequivocal statement made to the officers of the plaintiff at the time of the discount that the defendant was to be regarded as a mere accommodation indorser, and that the obligation of the defendant was not to be relied upon except upon the failure of both the maker and the railroad company to pay the note. Again, the form of the indorsement of the defendants' name upon the note was by Connecticut law notice to the plaintiff that the defendant was not *prima facie* an indorser for value or in regular course of commercial business. *Riddle v. Stevens*, 32 Conn., 387.

These considerations, with the fact heretofore stated, that the proceeds of this discounted note were appropriated by the plaintiff and applied in payment of a pre-existing indebtedness from the railroad company to the plaintiff, make further comment on this point superfluous.

Neither is there anything in this case to permit the application of the doctrine of equitable estoppel. The plaintiff was in no wise misled; it had full knowledge, it has parted with nothing.

Another consideration exists equally conclusive against the plaintiff's right to recover in this action. The indorsement in question in the defendant's name is a blank indorsement of a negotiable note by a person not a party to that note. In Connecticut such an indorsement has a peculiar but absolutely settled import. It is found that no contract different from that implied by law existed, and it is further found as follows:—"It was not proved nor claimed by the plaintiff that it had ever taken any steps to collect the note of the maker, nor that he was not of sufficient ability to pay it when it fell due, nor that the same could not have been collected of him by the use of due diligence;" thus

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negating the breach of the contract implied by law from such an indorsement. There is no reason why this rule of law should not govern this case. It is true that it is found that Walkley at the time the note was made, as president of the railroad company and of the defendant company, and individually, executed and delivered to Clark, the maker, a writing to the effect that whereas Clark had made the note to the order of the railroad company, in the sum of \$4,500, for the benefit of the railroad company, the undersigned agreed to pay the note at maturity and save Clark from all loss thereon. The record however states that the court "does not find that this agreement was made by Walkley in pursuance of any authority from the defendant company, express or implied, and that it was not proved that the plaintiff had any knowledge of it till long after the note became due." This is an attempted use by Walkley of the defendant's name upon an agreement declared in express terms to be wholly for the benefit of the railroad company. When Clark took this agreement and signed the note he had full knowledge that it was a scheme to pledge the credit and property of a life insurance company to secure the payment of a debt of a railroad company without consideration. This was manifestly beyond the powers of Walkley, and Clark had full information regarding all the facts. As the defendant company was not liable on this agreement to Clark, the plaintiff certainly has no rights through an invalid agreement the existence of which was unknown to it. The plaintiff undertakes to draw a distinction between such an indorsement by a third person "for the better security of the payee," and such an endorsement made for the "purpose of getting the note discounted at bank." This distinction is without foundation; no substantial reason is suggested to support it. The person discounting a note is practically the payee; the nature of the transaction with reference to the indorsement is the same; in the one case the payee named in the note refuses it unless he has the indorsement for his "better security," in the other the person refuses to discount the note for the same reason.

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None of the decided cases countenance this attempted distinction, and in several the language used by the judges is inconsistent with its existence. By way of illustration see *Riddle v. Stevens*, 32 Conn., 387, and *Holbrook v. Camp*, 38 id., 24. That of *Case v. Spaulding*, 24 Conn., 582-3, cited by the plaintiff counsel, supports no such distinction. That case merely determines the real and true relation of the parties to a note, presents a question of good faith as between indorsers, and was well decided conformably to the doctrine since laid down in *Dale v. Gear*, 38 Conn., 18, and *Graves v. Johnson*, 48 id., 164, and in similar cases. The fact is that in the state of Connecticut the rule of law applying to indorsements of this character is no part of the law merchant. See remarks of DUTTON, J., in *Riddle v. Stevens*, 32 Conn., 386. The rule is peculiar to our state. Eminent judges while admitting have regretted its anomalous existence. See the language of WAITE, J., in *Castle v. Candee*, 16 Conn., 288, and of DUTTON, J., in *Riddle v. Stevens*, cited above. A line of adjudications from the earliest history of our jurisprudence to the present time forbids further discussion in the courts as to the existence of this peculiar law, and warns us that the office of courts is "*jus dicere*" and not "*jus dare*;" to interpret law and not to make law. Although it may be that in the vast increase in recent years of commercial intercourse between our own and other states and countries, this rule, confined and peculiar to Connecticut, operates to declare a contract in most instances different from the actual intent of the parties, relief is to be had only through legislative action.

At the September term, 1880, of the Superior Court, the defendant moved for an order requiring the plaintiff to write over the blank indorsement of the defendant any contract which the plaintiff might claim to prove differing from that implied by law. The plaintiff objected to the making of such an order. The court however made the following order: "The plaintiff has leave to amend by adding a new count on or before January 15th, 1881, and at the same time to designate the count on which it relies, or in the alterna-

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tive, to write the contract which it claims on the back of the note over the indorsement of the defendant." In compliance with this order the plaintiff, on the 14th day of January, 1881, filed the following:

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"In the above entitled cause the plaintiff, in compliance with the order of the court, but protesting that said order is illegal and irregular, hereby gives notice that it intends to claim a recovery under the fourth count of the declaration, but does not hereby waive its right to offer evidence to support any other count of the declaration, and does not hereby waive its right to recover upon any other count of the declaration if the facts warrant such recovery."

At the September term, 1881, of the court, at the commencement of the trial, the plaintiff upon request of the defendant refused to designate any one count of the declaration on which it intended to rely, and the plaintiff's counsel read to the court the whole declaration, consisting of four counts, and claimed the right to offer evidence under each of the counts. Thereupon the defendant renewed its motion, and the court required the plaintiff to write over the indorsement on the note, before trial, any claimed contract differing from the one implied by law from such indorsement. This last order was in strict accordance with the rule stated in *Castle v. Candee*, 16 Conn., 234, and with the settled practice in cases of this character. So long as the plaintiff relies upon the contract implied by law the defendant is apprised of the plaintiff's claim, but when he seeks to avail himself of his right to prove another and different contract, then, in the language of the court in the case last cited, "we think upon the principles of fair trial that it is the duty of the plaintiff, if required, to fill up the indorsement before trial with the agreement upon which he intends to rely in his proof."

It is unnecessary to determine the effect of the order made in the first instance as limiting the right of a plaintiff to frame his declaration with different counts to meet the

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exigency of his proofs, for the plaintiff refused to conform to the order at the trial. That order was then abandoned and a new order made upon which the trial proceeded. The plaintiff was not affected by the original order. No question is here presented whether in a proper case the contract sought to be proved might not be stated alternatively. No claim was made that the plaintiff was uncertain as to what precise contract its evidence would tend to prove. The plaintiff simply refused to inform the defendant what agreement it claimed the defendant had made. It was very proper to require the plaintiff to do this.

Several questions of evidence arose upon the trial and are presented by the record, most of which are unimportant and are not pressed. Some however are insisted upon. William R. Cone, president of the plaintiff bank, was offered as an expert witness "to prove that it is the custom and usage of banks generally to require all paper discounted by them to be bankable or commercial paper, and all persons indorsing the same to be bound thereby." Unless this evidence was offered to contradict the contract implied by law from such blank indorsement, by substituting in place of the contract implied by law a contract implied from the usage and custom of banks, it was wholly immaterial. Nothing indicates that the paper was not "bankable or commercial," or that the persons indorsing it were not "bound thereby." The persons indorsing the note are "bound thereby" according to the rules of law applying to their indorsement and in no other way. If the evidence was offered to prove that banking people generally do not regard such blank indorsement as importing the contract which the Connecticut law implies, it was equally immaterial. Our peculiar rule of law in this particular did not spring into existence through, nor is it dependent upon, the understanding and custom of banks generally.

John W. Stedman, the insurance commissioner, was asked—"What was the condition of the defendant company as to solvency?" This was properly excluded. An inquiry as to the solvency of the defendant company as

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bearing upon the necessity of indorsing this note in order to obtain money, is quite remote and inconclusive. And if the defendant was commercially insolvent, that fact would not invest the president or any other agent with peculiar power to use its funds to pay the debts of the railroad company.

J. C. Walkley was asked whether, when he indorsed the note for the Charter Oak Life Insurance Company, he intended to assume the obligation of an indorser to the *Etna* bank. This question was properly excluded on the ground stated in the ruling of the court below, that is, that the uncommunicated and unexpressed intent of Walkley was immaterial. Besides this there was properly no question as to whether he in fact "intended to assume the obligation of an indorser." The controversy was as to the legal effect of that indorsement, and that is not to be controlled by his secret intent. His opinion was also properly excluded as to the effect of the non-payment of the interest coupons of the first mortgage bonds upon the value of the second mortgage bonds. If this was material to the issue, such effect could not be shown by the opinion of Walkley, not accompanied by any facts upon which the opinion proceeded. There is nothing to indicate that the witness had any special knowledge, or indeed that the subject was of a character upon which an expert's opinion could be given. The facts being shown it would seem that the court could form an opinion as well as Walkley. Such opinion at the best would have been wholly speculative.

There is no ground for a new trial, and no error in the judgment of the court below.

In this opinion the other judges concurred.

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SUPREME COURT OF ERRORS.

HELD AT NEW HAVEN, FOR THE COUNTY OF
NEW HAVEN,

ON THE FIRST TUESDAY OF JUNE, 1882.

Present,

PARK, C. J., CARPENTER, PARDEE AND LOOMIS, Js.

JAMES SMITH *vs.* THE STATE.

The statute (Gen. Statutes, p. 498, sec. 1,) divides the crime of murder into murder in the first and second degrees, and provides that in all indictments for murder "the degree of the crime charged shall be alleged." Held not necessary that the indictment should set out the facts constituting the crime murder in the first degree as distinguished from that in the second degree, but that it is sufficient if, after stating the crime in the ordinary common law form, an averment be added that the prisoner did thereby commit murder in the first degree.

WRIT OF ERROR to this court from a judgment of the Superior Court upon an indictment for murder. The plaintiff in error was found guilty of murder in the first degree and was sentenced to be executed. The indictment was as follows:—

To the Honorable Superior Court of the state of Connecticut, now sitting in New Haven, within and for the county of New Haven, on the first Tuesday of January, in the year of our Lord, one thousand eight hundred and eighty-one:

The grand jurors within and for said county, on their oaths present and inform that James Smith, of the town of

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Derby, in said county of New Haven, on the twenty-third day of December, in the year one thousand eight hundred and eighty, with force and arms at said town of Derby, in and upon the body of one Daniel J. Hayes, of said Derby, in the peace then and there being, feloniously, wilfully and of his malice aforethought, did make an assault, and that the said James Smith, a certain pistol then and there charged with gunpowder and one leaden bullet, which said pistol he the said James Smith in his right hand then and there held, then and there feloniously, wilfully and of his malice aforethought did discharge and shoot off against and upon the said Daniel J. Hayes; and that the said James Smith with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid, by the said James Smith as aforesaid discharged and shot off, then and there feloniously, wilfully and of his malice aforethought, did strike, penetrate and wound him, the said Daniel J. Hayes, in and upon the abdomen of him, the said Daniel J. Hayes, giving to him the said Daniel J. Hayes, then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said James Smith, in and upon the abdomen of him, the said Daniel J. Hayes, one mortal wound of the depth of four inches, and of the breadth of one inch; of which said mortal wound the said Daniel J. Hayes, from the said twenty-third day of December, in the year of our Lord one thousand eight hundred and eighty, to the twenty-seventh day of December, in the year of our Lord one thousand eight hundred and eighty, at said town of Derby, did suffer and languish, and languishing did live, on which last mentioned day, in the year aforesaid, in the town of Derby aforesaid he, the said Daniel J. Hayes, of the said mortal wound died. And so the grand jurors aforesaid, on their oaths aforesaid, do say that the said James Smith, him, the said Daniel J. Hayes, in the manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder. And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said James Smith, in

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the manner and form aforesaid, did thereby commit the crime of murder in the first degree.

The writ assigned for error the insufficiency of the indictment and an error of fact, which latter error was stricken out, upon objection taken, as within the sole jurisdiction of the Superior Court.

L. N. Blydenburgh and T. J. Fox, for the plaintiff in error.

The statute (Gen. Statutes, p. 498, sec. 1,) which divides the crime of murder into murder in the first degree and second degree, also provides that "the degree of the crime shall be alleged in the indictment." If it is alleged or pleaded, it must be well pleaded. 2 Bishop Crim. Pro., §§ 564, 589; 1 Bishop Crim. Law, § 797; *Smith v. The State*, 1 Kan., 365; *State v. Brown*, 21 id., 88; *State v. Morse*, 1 G. Greene, (Iowa,) 503; *State v. Chambers*, 2 id., 308; *Fouts v. The State*, 4 id., 500; *State v. McCormack*, 27 Iowa, 402; *State v. Watkins*, id., 415; *State v. Boyle*, 28 id., 522; *State v. Knouse*, 29 id., 118; *State v. Thompson*, 31 id., 393; *Bower v. The State*, 5 Misso., 364; *State v. Jones*, 20 id., 58; *State v. Feaster*, 25 id., 325; *Rich v. The State*, 8 Ohio, 111; *Robbins v. The State*, 8 Ohio St., 181; *Fouts v. The State*, id., 98; *Kain v. The State*, id., 306; *Hagan v. The State*, 10 id., 459; *Loeffner v. The State*, id., 599, 615; *Finn v. The State*, 5 Ind., 400; *Snyder v. The State*, 59 id., 105.

T. E. Doolittle, State's Attorney, for the State.

CARPENTER, J. This is a writ of error brought originally to this court. It seeks to reverse the judgment of the Superior Court, which passed sentence of death upon the plaintiff in error. Two errors were assigned, one of law and one of fact. The latter error the Superior Court alone would have jurisdiction of, and on objection taken by the state's attorney this assignment of error was stricken out, and the cause was heard on the alleged error of law.

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The error alleged is that the indictment is insufficient, inasmuch as it does not set out the facts and circumstances essential to constitute the crime of murder in the first degree, but simply avers, after stating the offence in the ordinary common law form, that the prisoner "did thereby commit the crime of murder in the first degree." This it is claimed is not a compliance with the statute of 1870, (Gen. Statutes, p. 498, sec. 1,) which provides that "in all indictments for murder the degree of the crime charged shall be alleged."

The crime of murder in this state is a common law offence. It was not created by statute and no statute has ever attempted to define it. Prior to 1846 the crime was recognized and its punishment provided for by statute as follows:—"Every person who shall commit murder, and be thereof duly convicted, shall suffer death."

In 1846 a statute was enacted, the preamble of which recites that "whereas the several offences which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment; therefore," &c. It then makes two degrees of the crime and prescribes the punishment for each degree. That statute has been incorporated with that of 1870 in the revision of 1875, page 498, and is now in force. Its sole object was to make the punishment proportionate to the degree of atrociousness. It created no new offence, and introduced no new element into the offence as it then existed. It required no change in the mode of stating the offence in the indictment, or in the form of proceeding, except that the jury were to ascertain the degree of the crime in the verdict as a matter of fact and not of law; and that for the sole purpose of punishing the offence according to its atrociousness. *State v. Dowd*, 19 Conn., 388.

An essential element of the crime of murder is malice aforethought. That element remains as it always has been, unchanged by the statute of 1846. Good pleading required only that it should be stated. The evidence by which it

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was expected to prove it need not be averred—indeed should not be, as the rules of pleading require that only facts should be stated and not evidence of facts. Hence it was never necessary to set out the evidential facts tending to prove malice aforethought, and it has never been done except when the means of killing also show malice; and then the manner of killing was stated, not for the purpose of showing malice, but for the purpose of showing in what manner the death was accomplished. For similar reasons the kind of malice, whether express or implied, need not be stated in the indictment, either at common law or under the statute of 1846.

Now the statute dividing the crime of murder into degrees has reference solely to the element of malice aforethought. Malice is of two kinds, express and implied. In this respect the statute makes no change. But it does in effect make all cases of express malice murder in the first degree. If the statute had in terms provided that all cases of express malice should be murder in the first degree, and all cases of implied malice merely should be murder in the second degree, we think it is quite clear that the degree of the crime would depend upon the degree of malice; and as the degree or kind of malice need not be averred, it follows that the statute requires no change in the matter of pleading.

The statute is regarded by many as resting the degree of crime upon this distinction, and we think it is the correct view as applied to all cases except those enumerated in the statute and expressly made murder in the first degree.

The statute requiring the degree of the crime to be alleged in the indictment was considered by this court in *State v. Hamlin*, 47 Conn., 95. In that case the indictment followed the language of the statute of 1846 and alleged the essential ingredients of murder in the first degree, but did not allege in terms that the crime therein charged was murder in the first degree. The want of that averment, it was claimed, rendered the indictment defective. The court held otherwise. In giving the opinion of the court, HOVEY, J., says:—"The object of that statute was to give to the defen-

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dant information from the indictment itself, whether he is to answer to a charge of wilful, deliberate, and premeditated murder, or of murder of a lower degree. And the object is accomplished by any allegation which communicates to the defendant, with reasonable certainty, that information. That the addition to an indictment in the common law form of an allegation that the crime therein alleged was murder in the first degree, would be sufficient, cannot be doubted. But the counsel for the defendants insist that no other allegation will satisfy the requirement of the statute. We are of opinion, however, that where the indictment charges the crime to have been committed by the defendants feloniously, wilfully, deliberately, premeditatedly, and of their malice aforethought, as the present indictment does, it is equivalent to an allegation in an indictment in the common law form, that the crime charged therein is murder in the first degree, and is therefore sufficient."

This is something more than a mere *obiter dictum*. The court had before it the question—what does the statute require? and after careful consideration answered it in the language quoted. In doing so they laid down a rule which is decisive of this case. As the degree of the crime depends upon the degree or kind of malice, an allegation that the offence charged is murder in the first degree necessarily charges that the offence was committed deliberately and with premeditation; and *vice versa*.

We must regard that case and the case of *State v. Dowd* as settling the law on this question for this state. And we think it is correctly settled. The statute of 1870 was no more intended to change the mode of stating the offence, except to allege in some form of language the degree of the crime, than was the statute of 1846. The definition and essential ingredients of the degrees of the offence remained unchanged. As the former act required the petit jury to say in their verdict whether the crime of which they convicted the prisoner was murder in the first or second degree, so the latter required the grand jury to say in the indictment which grade of the crime they intended to charge him

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with. No technical words or particular form of expression are required. The natural and obvious course was pursued in this case. The grand jury, following the language of the statute, said in explicit terms,—“And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said James Smith, in the manner and form aforesaid, did thereby commit the crime of murder in the first degree.”

There is no error in the judgment.

In this opinion the other judges concurred.

NOTE. Judge SANFORD of the Superior Court sat in the place of Judge GRANGER, absent.

THE NEW HAVEN STEAMBOAT COMPANY *vs.* SARGENT & COMPANY.

A portion of the flats lying between the upland and low water mark on the sea-shore, was conveyed by the owner of the upland by metes and bounds, leaving a portion of the flats lying outside, between the part conveyed and low water mark, the part conveyed cutting off all access to the outer part from the upland. Held that the grantee took the right to reclaim and use the outer flats with the portion of the flats definitely conveyed. No claim had been made for thirty years to these outer flats by the owner of the upland. Held that if the grantee were to stand on a title acquired by adverse possession of the portion conveyed, such possession would be regarded as embracing the outer portion of the flats as appurtenant. The plaintiff and defendant were adjoining owners of reclaimed land on a harbor, with the right of wharfing out. The line of the shore was substantially east and west, and their dividing line at right angles to it, while the channel ran north-east and south-west. In wharfing out in a line with their dividing line, it would be necessary to go twenty-four hundred feet to reach the channel; while in wharfing out in a south-easterly direction and at right-angles to the channel, it would be necessary to go but fifteen hundred feet. The parties had reclaimed the flats for a short distance and in a line with their dividing line. Held that their rights were to wharf out in that line and not in the more direct one.

CIVIL ACTION to recover wharfage collected by the

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defendants, at a wharf which the plaintiffs claimed to own; brought originally before a justice of the peace and, by appeal, to the Court of Common Pleas. The defendants were a joint stock corporation. Facts found by a committee and case reserved for advice. The case is sufficiently stated in the opinion.

C. R. Ingersoll and T. E. Doolittle, for the plaintiffs.

J. S. Beach, for the defendants.

CARPENTER, J. The defendant collected a small amount of wharfage for the use of a wharf in New Haven. The plaintiff, claiming to be the sole owner of the wharf, brings this suit to recover the amount thus collected. The case is reserved for the advice of this court.

Each party claims title to the *locus in quo*, not by virtue of any deed embracing it, but by virtue of its ownership of other property in the immediate vicinity. The situation of the property is substantially this:—The northern boundary of New Haven harbor is a line at high water mark, running substantially east and west, and is practically the southern line of Water street. Running north from Water street is East street. The plaintiff owns or claims to own a strip of land eighty-three feet wide and fourteen rods long lying on the south side of Water street and on the east side of East street extended across Water street into the harbor. About two hundred feet south of the plaintiff's land, at a point in the flats directly east of the east line of East street extended, is a sewer constructed by the city of New Haven. That sewer is covered for its protection, and in such a manner as to constitute a substantial wharf. It was at this point that the wharfage in question was collected.

The defendant owns a lot of land directly south of Water street and west of East street extended.

Neither party disputes the title of the other to the premises covered by its deeds, but the nature and origin of the plaintiff's title is the subject of some contention; and each

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party denies that the other has any title to or interest in the *locus in quo* or sewer wharf. Both parties claim that the city has no interest therein. The defendant claims that the plaintiff's title, if it has any, is by adverse possession and embraces only the land actually occupied, and does not carry with it the right to erect wharves on, or to reclaim, any other part of the shore; and also claims that if the plaintiff has any title by deed, the deeds only purported to convey flats and do not convey any interest beyond the exterior boundaries of the deeds, and consequently that the plaintiff has not the incidental rights of a riparian proprietor. The plaintiff claims that he has a good title by deed and has all the rights of a riparian proprietor.

In 1807 Water street was a highway about two and one-half rods wide, running east and west along the bank on the northern boundary of the harbor of New Haven. In that year the committee of the proprietors of the common and undivided lands and the selectmen of the town of New Haven, contracted with Isaac Tomlinson, he agreeing to build a sea-wall below high water mark so as to make Water street four rods wide. In consideration thereof the committee and selectmen executed a conveyance purporting to convey all their proprietary rights, with some reservations not important now to be noticed, in the flats extending eight rods from the south line of the highway southerly towards the water. That deed was on condition that it was to be void if Tomlinson failed to build the wall and complete the street according to his contract. Tomlinson also agreed to keep the road in repair and save the town harmless from any expense by reason of its being out of repair. The contract and the deed also provided that the premises conveyed should be subject to a lien in favor of the town to secure the performance by Tomlinson of this last named agreement.

In 1825 the sea-wall and the street were not completed. Pursuant to a vote of the town, and of an arrangement with all parties concerned, the details of which are unimportant, the selectmen released the incumbrance and the interest of

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the town in the premises to William Moseley. Moseley and others completed the sea-wall and the street, and thereupon, by virtue of the conveyances mentioned, whatever rights might legally be conveyed thereby vested in Moseley.

The strip of flats described in the deeds, and lying easterly of East street extended was reclaimed. In 1852 the committee of the proprietors executed a deed purporting to convey to Moseley a strip of flats east of East street extended and south of the eight rods previously conveyed, which has also been reclaimed. The title to the land thus reclaimed is now in the plaintiff.

It is claimed that the proprietors and the town had no title to the shore which could be conveyed. This must be conceded, as the title to the shore, as is now well settled, is in the state. But it is equally well settled that a riparian proprietor has an easement in the adjoining shore, including the right to erect wharves, stores, &c., thereon. And while the deeds may have conveyed no title to the fee, whatever franchise or right the proprietors or the town had to reclaim the shore or construct wharves thereon, was conveyed to and vested in Moseley.

Whether they had any such right depends in some measure upon facts and circumstances which do not appear in this case. They then had the right of reclamation or they had not. If they owned the bank, or if they had sold it reserving the right to reclaim the shore, then the right was in them and it passed to Moseley. If they had previously sold the land north of Water street bounding on the street, and the law is so that that deed conveyed the fee to high water, and there was no reservation of the shore, then we suppose the purchaser took the right to reclaim, and the deeds conveyed nothing to Moseley.

We will assume that the first supposition is the correct one, and that the proprietors had a right which they could convey. In that event the whole arrangement contemplated that a strip of the shore next to the line of high water should be reclaimed and made a part of the permanent highway. It also contemplated that Moseley should re-

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claim another portion of the flats south of the highway eight rods wide. We think it will best give effect to the intention of the parties, and do no injustice to any one, to regard those two strips of land thus reclaimed as upland, and that the title in fee vested in Moseley, whereby he became the riparian proprietor—his riparian rights however being subject to such legal qualifications as may exist by reason of the fact that his deeds in terms conveyed only a portion of the flats.

The question now to be considered is, whether Moseley took any interest in the flats beyond the exterior lines of the premises conveyed. Ordinarily a question of this kind would be answered in the negative, unless it had reference to a deed of land bounding on a highway, river, shore, or the like. Such would be the general rule; but we think this case may well form an exception to such a rule.

Had the proprietors owned a fee in the shore then the ordinary rule would doubtless apply, for they then would have owned the shore as they did other property and might have sold it in such portions as they pleased. But they had no title to the fee; they only had an incorporeal right in the shore, which was an incident to their ownership of the upland. That such a right may be separated from the upland and sold or retained apart from it has been decided by this court. *Simons v. French*, 25 Conn., 346. And we suppose the principle of that case may admit of a territorial division of a right of this character. But we think such a right cannot be entirely separated from the principal thing to which it is appurtenant. To illustrate: a party may sell a portion of his upland reserving his right to all of the shore. In that case he has access to the shore over the portion of land not sold. He may also sell all of his upland reserving the shore. In that case he expressly or by implication reserves a right of way over the land sold to the shore. If he sells the shore without the upland he in like manner grants a right of way to it; the principle being that he who has a right to reclaim the shore must in some manner have access to it. Of course each case must depend

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upon its own circumstances. When he has access to it independent of the adjoining shore the suggestions we have made do not apply. The circumstances of each case should be interpreted reasonably and so as to give effect to the intention of the parties so far as it can be done consistently with well-established legal principles.

In *Simons v. French* the intention of the parties not to convey the portion of the shore in dispute was apparent. The grantor sold only a portion of the upland, carved out by definite and precise boundaries, thus indicating an intention to convey nothing beyond those lines. He also in the same deed conveyed a specified portion of the shore, not including the disputed premises. In this case the deed carved out by definite lines a portion of the shore, thereby excluding from the direct operation of the deed that portion not described. So far the cases are parallel; but here there is a divergence. In that case, after the conveyance the grantor had access to the shore. In this case the grantors had none. The part sold was shore next to the upland, and included all the shore on the line of high water east of East street extended. As the part conveyed was comparatively of little value until reclaimed, and, when reclaimed, the cost of reclamation represented nearly its entire value, there is no room for the presumption that the grantors reserved a right of way over it to the flats beyond.

Again: it is probable that the deeds from the proprietors, under which the plaintiff claims, were limited to a portion of the flats on the supposition that the proprietors owned the shore in fee. If so it is by no means certain that there would have been such a limitation if it had been certainly known that they only had a franchise. In this view of the case we do not necessarily impute to them an intention to divide an incorporeal right in the manner indicated. What they would have done had there been no misapprehension as to their legal rights it is impossible now to tell. Hence we do not base our decision on this ground, but simply allude to it as a circumstance we have not overlooked.

Again: it is now about thirty years since the last deed.

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to Moseley was given. During that time it does not appear that the proprietors, or the town, or any one claiming under them or either of them, have made any claim whatever to that portion of the flats now in controversy. The fact that no claim has been made and no right asserted for so long a period of time, affords some presumption that no such right exists.

Finally: public policy dictates that the right to reclaim land and construct wharves should be in some one in respect to all parts of the shore in a harbor like that of New Haven. Now if the plaintiff has not that right in the premises we are unable to discover from this record that any one has, unless indeed the defendant's claim is valid, that it has a right to extend its wharves in that direction—a point we will presently consider. It will be observed that the defendant does not point out any right or interest outstanding in any other party; and it is especially noticeable that in respect to the point now under consideration the defendant can have no controversy with the plaintiff, because the deed from the proprietors to Jesse Leavenworth in 1771, under which the defendant claims, is limited by definite boundaries to a portion of the flats extending eight rods on the south line of Water street and extending southerly ten rods, which, as the case shows, falls far short of reaching low water. We might well have taken this point for granted, and have conceded to each party the right, as each claims it, to extend its land to low water or to the channel. But as the point was made and elaborately discussed, that the plaintiff was not a riparian proprietor, and as we have carefully considered the subject, we have thought best to express an opinion upon it.

In view of all the circumstances of the case we have come to the conclusion that, as between these parties, the plaintiff is in law a riparian proprietor. Not that we are prepared to lay it down as a rule that a sale of the bank necessarily carries with it all interest in the shore, but our decision rests upon the peculiar circumstances of this case. The proprietors, supposing themselves to be the owners in

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fee, sold their right or interest in a portion of the shore by metes and bounds; and their interest in the remaining portion, which was by implication reserved to themselves, was thereby completely severed from the upland. Whether incorporeal property of this character, which can only be enjoyed in connection with the corporeal property to which it is appurtenant, can be completely severed from it may be doubtful. If it is to be done it should be in clear and unmistakable language. We are not disposed to produce such a result by construction. If there is room for doubt whether such a result was really intended, and the party interested in claiming it has rested quietly for over thirty years without asserting his right, we may well presume that he has abandoned it; especially as the right, if it exists, is merely of a nominal value.

But take the other alternative, and suppose that the proprietors had no right in the shore which they could convey; then Tomlinson and Moseley took nothing by their deeds; for the grantors had neither the fee nor the right to reclaim. The only effect of the deeds was to give color of title and to furnish some evidence that the grantees occupied under a claim of right.

The case then is simply this:—those under whom the plaintiff claims, without any legal right, but under a claim of right, entered the shore next to the upland and reclaimed it. It then became upland, and fifteen years adverse possession gained a title.

The defendant however insists that the title thus gained was only commensurate with the user. That is doubtless true in respect to the land itself, but it is doubtful whether the rule ever applies to an incorporeal right appurtenant to the land. If the right is of such a character that it can only be enjoyed by him who is in possession of the land, then title to the land by possession carries with it a title to the right. And that is this case. The disseisor intervened and placed a piece of his own land between the upland proprietor and the shore. He thereby interrupted the right of the proprietor to extend his own land by a wharf or

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other structure to low water. That interruption having continued for fifteen years the right is gone. Suppose for illustration that the part disseised had been on the other side of the line of high water, and the proprietor had been in that manner cut off from the shore, can it be doubted that he would thereby have lost his interest in the shore? The result is the same in either case and must be attended with the same legal consequences.

But the defendant, claiming to be a riparian proprietor, and that it has a right to extend its land or wharf to the channel, insists upon the right to do so in such a manner as to embrace the *locus in quo*. And that brings us to the only remaining question, which is, in what direction do the riparian rights of the parties extend?

The east and west boundary lines of the land of each party run nearly north and south. The line of low water in front of each is nearly parallel with the southern boundary or line of high water and from six to eight hundred feet therefrom. Had that also been the line of the channel we suppose no question would have been made about the propriety of extending the upland lines to the channel. That would have been the natural and obvious as well as a reasonable mode of division. But the channel, commencing at a point quite a distance easterly of the plaintiff's land, runs in a south-westerly direction to a point further west than the western boundary of the defendant's land. The defendant can reach the channel or deep water by extending its land directly south about twenty-four hundred feet. It can also reach the channel, and practically at right angles with it, by extending its land in a south-easterly direction about fifteen hundred feet. Extended in this direction it covers the sewer wharf. The right to do this is what the defendant claims.

The cases cited by the defendant in support of its claim—that it has a right to extend its land in the most direct course to the channel—are of two classes. Some of them relate to the channel and involve the right to construct wharves, while others relate to low water line and involve questions in respect to the division of the shore.

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In cases where the line of the channel and the line of low water are substantially the same or are parallel, no confusion arises and the rule is easily applied. But where, as in this case, they differ, one or the other must be adopted as the line to be reached to the exclusion of the other. It is impossible to adopt both without producing an irreconcilable conflict of rights.

We think in this case each party has a right to extend its upland in the most direct course to the line of low water.

In the first place, that is practically the rule which the parties and their respective grantors have adopted heretofore. The defendant's bank has been extended in that direction ten rods and the plaintiff's fourteen rods. To change the direction now would produce great confusion, while a continuance of the lines as begun will effect an equal division of the flats, and in a manner not obnoxious we think to any just rule hitherto established.

In the next place, each party thereby obtains reasonable wharfing facilities. As soon as low water is reached, if not before, the party has a wharf suitable and convenient for many purposes. It is not accessible at all times, nor at any time to larger vessels, but a wharf equal in most respects, if not all, to the wharf which is the subject of this controversy. The law guarantees to each riparian proprietor only such wharfage facilities as the condition of the harbor and the situation of his land with reference to it will afford. If he has less than others it is his misfortune.

But if either party desires to extend his wharf to the channel, and thereby make it accessible to larger vessels, he can do so by extending his land about nine hundred feet further than would be necessary in the direction for which he contends. Here again he has no cause of complaint. He must take his riparian rights as he finds them. If he has to go a greater distance to reach deep water it may be his misfortune, but it is no reason why he should interfere with the established rights of others.

Judgment is advised for the plaintiff.

In this opinion PARK, C. J., and LOOMIS, J., concurred.

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PARDEE, J. (dissenting.) By several conveyances the plaintiff has become the owner of the riparian proprietor's right to reclaim and use a definitely limited fragment of the shore upon New Haven harbor, extending fourteen rods seaward, eighty-three feet and four inches along the upland, the south and west lines being parallel respectively with Water and East streets. The grant is in terms of the grantor's *right in flats*. So far as the record discloses the riparian proprietor retained, and to this present retains, the upland, together with the right to reclaim and use that portion of the shore appurtenant thereto not included in the above mentioned grant. In *Simons v. French*, 25 Conn., 346, this court determined that he might divest himself of his right to reclaim and use the shore and retain his upland; also that he might divest himself of this right to a specifically described portion of the shore and retain the remainder. Under this decision, whenever a grantee accepts a deed which expressly bars him from any portion of the upland and confines him to the right to redeem and use a fragment carefully carved from the shore, located by reference to monuments and measured in inches, I think he is ever after to be restrained within his self-imposed boundaries; and if he makes his portion solid with earth or stone that he does not thereby supplant the riparian proprietor and become one himself; does not take to himself the right reserved to that proprietor to redeem and use the portion of the shore not specifically conveyed.

Inasmuch as this suit is for money received for the use of a wharf outside of the boundaries of the grant to the plaintiff, I think judgment should be for the defendant.

HARRIET R. CADY vs. THOMAS FITZSIMMONS, JR.

A highway laid out by the original proprietors of a town ceased to be used by the public in 1812, but had never been legally discontinued. At that time the selectmen of the town undertook to convey to S by deed the

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interest of the town in it. *S* fenced the land, and he and his grantees held exclusive and adverse possession for over sixty years. Held—1. That the fact that the land was legally highway (if it was still so to be regarded,) did not prevent the adverse possession running against the private right of an adjoining owner. 2. That the deed of the selectmen was admissible, although passing no title, as giving character to the possession under it.

Whether the facts were sufficient to warrant the inference of an abandonment of the highway as such by the public: *Quare.* The court inclined to so regard them.

TRESPASS *qu. cl. fr.*, brought to the City Court of the city of Waterbury and heard before *Cowell, J.* The defendant pleaded the general issue, with notice that he should show that the *locus in quo* was a part of a public highway, that the plaintiff had no title to the same, and that if the highway had been discontinued the *locus* belonged to his grantors and to him as adjoining proprietors. The following facts were found by the court.

The plaintiff and defendant at the time of the alleged trespass were adjoining proprietors of lands situated on the northerly side of Pine street, in the city of Waterbury. The *locus in quo* is a part of an old highway, laid out by the original proprietors of the town in 1737. The highway was originally a continuation of the Pine Hole road (now Pine street) and was travelled until the year 1812. It was known and called "the old ten rod highway," and terminated in what is now known as Cooke street. East of the highway was the land of the grantors of the plaintiff and west of it that of the grantors of the defendant. In 1812 the selectmen of the town of Waterbury assumed by deed to exchange with one Ashley Scott (a grantor of the plaintiff,) the old highway for a piece of land deeded by Scott to the town, the same being the present continuation of Pine street to Cooke street.

The plaintiff and her grantors have been in possession of this old highway since the exchange in 1812, claiming it as their property. The defendant objected to the admissibility of the deed of exchange from the selectmen to Scott, on the ground, *first*, that it did not on its face purport to have been

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lawfully executed and acknowledged, and, second, because no vote of the town was shown to have been passed or was ever in fact passed, authorizing the selectmen to convey away the old highway. But the court admitted the deed in evidence, not for the purpose of showing title in the plaintiff, but for the purpose of showing the possession of the plaintiff's grantors and herself, and of characterizing the same; for which purpose alone the plaintiff offered the deed. To this ruling the defendant excepted. The plaintiff and her grantors have kept the *locus in quo* enclosed by a fence since 1812, and occupied the same exclusively.

None of the acts of the defendant of which the plaintiff complains were committed outside of the limit of the original highway. The fence began at the southwest corner stone of the original highway and pursued a north-easterly course, ending at the northeast corner of the highway, and is partly a stone wall, partly a brush fence and partly a rail fence. All the acts of the defendant were committed on that part of the old highway which, if the highway had been lawfully abandoned or discontinued, would have reverted to the grantors of the defendant, but on the easterly side of the fence above described of the plaintiff.

The old highway has never been discontinued in the mode prescribed by law, but the court finds that the effect in law of the exchange of deeds above stated was a virtual abandonment of the highway, in connection with the disuse of it since 1812 by the public. The court further finds, that the possession of the plaintiff and of her grantors, since 1812, has been adverse, and that by such adverse possession her title is now intact. No vote was ever passed by the town of Waterbury, in town meeting, authorizing the selectmen in 1812, or at any other time, to make exchange deeds in the manner stated.

Upon these facts the court rendered judgment for the plaintiff, and the defendant carried the case to the Superior Court by a motion in error. That court (*Carpenter, J.*.) affirmed the judgment of the City Court, and the defen-

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dant brought the record before this court by a motion in error.

G. Kendrick, for the plaintiff in error.

1. It is found that all the acts of the defendant complained of were committed in such part of the highway as, if the highway had been lawfully abandoned or discontinued, would have reverted to the defendant's grantors; also that the highway has never been "discontinued in the mode prescribed by law." The highway was laid out by the original proprietors of the town, and under such a lay-out the fee vested in the town and could be divested only by a legal discontinuance. The plaintiff's fence was therefore an unlawful obstruction and nuisance, which any person might lawfully remove. *Stiles v. Curtis*, 4 Day, 328; *Peck v. Smith*, 1 Conn., 109; *Chatham v. Brainard*, 11 id., 82, 89; *Church v. Meeker*, 34 id., 429, 481; *State v. Merrit*, 35 id., 316.

2. But it is claimed that the plaintiff and her grantors have acquired title by adverse possession. But no right is gained by fencing up a highway to keep the fence there. The fence may at any time be removed, no matter how long it has been there. It was a nuisance when erected and the keeping of it there was but a constant repetition of the nuisance. No right can thus be acquired. *Parker v. Framingham*, 8 Met., 260. It is not claimed that the plaintiff's grantor took any thing by the deed of the selectmen. That deed was wholly inoperative. The highway must have been lawfully discontinued or abandoned to enable the possession of the plaintiff and her grantors to operate against the title of the defendant and his grantors.

3. The deed of the selectmen was offered in evidence solely for the purpose of characterizing the possession of the plaintiff's grantors, and was admitted by the court only for that purpose. Yet it appears by the finding that the deed was made a further use of by the court, namely, as evidence of an abandonment of the highway by the town, the court holding that "the effect in law of the exchange of deeds

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was a virtual abandonment of the highway." The court has thus found an important fact on evidence that it had admitted solely for another purpose.

H. B. Graves and *H. R. Morrill*, for the defendant in error.

PARK, C. J. It appears by the finding in this case that the *locus in quo* had been in the exclusive and adverse possession of the plaintiff and her grantors since the year 1812, a period of nearly sixty-eight years, when this suit was brought. It would seem, therefore, hardly possible that there could be a defence to the action.

But it further appears that the *locus* is within the limits of an ancient highway, which was regularly laid out by the proprietors of the town of Waterbury in the year 1737, and that it has never been legally discontinued, although in the year 1812 the selectmen of the town undertook by deed to exchange, with one of the grantors of the plaintiff, the land covered by the highway, for other lands needed for another highway. The exchange was in fact made, and ever since the public have acquiesced in it. From that time the *locus in quo* has been inclosed, by the plaintiff and her grantors, with a sufficient fence, and they have been in exclusive, adverse and peaceable possession up to the time the defendant committed the acts complained of.

The defendant claims that, inasmuch as the highway has never been legally discontinued, it still remains a highway, and that the fence inclosing it was a public nuisance, which he had a legal right to remove.

It is unimportant in this case whether or not the highway was legally discontinued, for the defendant did not remove the fence because it was an encroachment upon the highway, with an intention to use the highway as such, but he removed it to assert his private right to the land covered by the highway. Besides this he has given no notice under the general issue that he should claim that the fence was a public nuisance, and therefore he cannot make the claim

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now. His notice only called in question the title of the plaintiff to the premises in question, and set forth title in himself. Now, whether the highway was legally discontinued or not, the exclusive, adverse possession of the plaintiff and her grantors of the *locus in quo* for so long a period, extinguished whatever title the defendant may have had and established the title in herself. She has the absolute right to the land as against every body but the public, even if the public right has not been extinguished. The facts would seem to be sufficient to warrant the inference of an abandonment of the highway as such by the public; but it is not necessary for us to consider this question.

The public have nothing more than an easement in the soil of a highway, while the fee of the land is in the adjoining proprietor. Such fee, even while the highway exists, is as much the subject of prescription or of the operation of the statute of limitations as it would be if there were no highway. The only difference consists in the difficulty of establishing and maintaining adverse user against the adjoining proprietors, while the public are using the highway.

But here no such difficulty existed. The public in fact had ceased to use the highway and suffered the plaintiff and her grantors to fence it up for a long period of time, much longer than was necessary for the statute to run against the defendant's claim. We think the title to the *locus in quo* was in the plaintiff.

The defendant further claims that the court erred in admitting the deed of the selectmen in evidence as tending to characterize the possession of the plaintiff and her grantors of the premises in question. We think the evidence was proper for the purpose. The deed, in connection with the acquiescence of the public, tended to show that the grantors of the plaintiff believed they had a good title to the premises, and claimed the same accordingly. The defendant claims however that the court has made use of the deed for a further purpose, for which it was not offered nor admitted, namely, as evidence of an abandonment of the

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highway, as such, by the public. But the court did not treat the mere deed as proof of this, but the fact of the deed being given, in connection with the disuse of the highway from that time by the public, as evidence of abandonment. This question however becomes unimportant, as we regard the question of abandonment as not affecting the result.

There is no error in the judgment complained of.

In this opinion the other judges concurred; except CARPENTER, J., who, having decided the case in the court below, did not sit.

CHAUNCEY ALLEN vs. THE NEW HAVEN AND NORTHAMPTON COMPANY.

The statute (Gen. Statutes, p. 232, sec. 10,) provides that any person injured in person or property by means of a defective road, may recover damages from the party bound to keep it in repair; but that "when the injury is caused by a structure legally placed upon such road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor." Held—

1. That the statute applies to a case where the highway was established after the railroad was built, as well as to one where it had previously existed.
2. That the expression "it, and not the party bound to keep the road in repair," is to be read as if it was "the party otherwise bound," &c.
3. That a railroad track laid across a highway does not necessarily render it defective and unsafe, and that it was not the intention of the statute to make the railroad company liable for every injury from the track, without reference to the condition of the highway.

In a suit against a railroad company for an injury caused by the condition of its track at a place where it crossed a highway, the declaration alleged that the company was chartered with authority to construct and operate a steam railroad and had constructed it at the crossing in question before the injury complained of. Held to be a sufficient averment that the structure was legally placed upon the highway.

The defendants at a former term of the Superior Court demurred to the plaintiff's declaration, the demurrer was overruled, the case heard in

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damages, and damages awarded. The judgment was reversed by this court on the defendants' motion in error, but not on any point affecting the damages, and the case was remanded to the Superior Court. In that court the defendants afterwards demurred to a replication filed by the plaintiff. Held that, on the overruling of this demurrer, the defendants were not entitled to a new hearing in damages.

ACTION upon the statute (Gen. Statutes, p. 232, sec. 10,) for an injury upon a highway defective from the condition of the track of the defendant railroad company at a crossing; brought to the Superior Court. The same case was before this court at a former term, (49 Conn. R., 243,) on a motion in error of the defendants from a judgment rendered on a hearing in damages after demurrer overruled. The judgment having been reversed the case was remanded to the Superior Court, where the plaintiff filed a replication to the defendants' previously filed pleas in bar, to which replication the defendants demurred, and the case was reserved upon the pleadings for the advice of this court. The points decided by the court will be sufficiently understood without setting out the pleadings.

J. S. Beach, in support of the demurrer.

H. Stoddard, contra.

LOOMIS, J. The questions reserved under the pleadings relate to the sufficiency of the declaration and the defendant's pleas in bar, and their solution depends upon a proper construction of the statute, (Revision of 1875, p. 232, sec. 10,) upon which the action is brought. The statute is as follows:—"Any person, injured in person or property by means of a defective road or bridge, may recover damages from the party bound to keep it in repair," * * "and when the injury is caused by a structure legally placed on such road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor."

The declaration, in accordance with the plaintiff's construction of the statute, alleges in substance that the duty of the defendant was to keep that part of the highway

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occupied by the railroad crossing in good and sufficient repair, and that the duty was neglected in suffering, at the point of intersection, the rails, sleepers, planking and structure of the railroad to be and remain projecting above the surface of the highway, and the earth to be worn away and excavated by the side of the track so as to be unsafe and dangerous for travelers in crossing, and that this negligence caused the injury.

On the other hand the defendant contends that the statute does not predicate liability for injuries upon the condition of the highway as to repairs or any negligence in the matter, but absolutely makes the railroad company liable for any injury caused by a lawful structure thereon, provided the highway existed before the structure was so placed. It was argued that the tenth section of the statute contemplates two classes of liability—one originating in the omission of a legal duty, and the other in the commission of a legal act.

A strict adherence to the words of the statute will support this construction, but to adopt it will give a harsh and arbitrary quality to the act of the legislature, whereby a liability is placed on the railroad company not predicated upon any fault or neglect of duty, making them absolute insurers against accidents of every nature caused by the railroad structure; a principle entirely different from that which is applied in analogous cases to all other corporations.

If a liberal construction will relieve the law from such injustice it should be adopted, and this we think may be done. The statute under discussion is part and parcel of legislation making one kind of corporations, namely towns, liable for neglect of duty relative to highways within their limits. Now the object of the provision referred to was not to change the principle or ground of liability, but merely to make another party, to wit, the railroad corporation, liable. The obscurity in the statute arises mainly from the last clause:—"it, (meaning the railroad company,) and not the party bound to keep the railroad in repair, shall be liable therefor." The arrangement is antithetical and taken as it stands seems to imply that the railroad company is not

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bound to repair; but the true meaning is, "it, and not the party *otherwise* bound;" that is, the town or municipality upon which by general statute the burden rests and which is bound to keep in repair the highway thus crossed at all other places. It was thought necessary to do more than to provide that the railroad company should be liable; that would leave it open to the claim that the town also might still be liable; hence the act proceeds to negative any liability on the part of the town.

This construction will be strongly confirmed by a reference to the original act as it stood prior to the revision of 1875. It reads as follows:—"That no town shall be liable to any suit or action for an injury received on any highway in such town, by reason of any structure placed on said highway by any railroad corporation by authority of law; but such damage may be recovered in a suit against said railroad company." Acts of 1869, p. 350. If this language had been retained it would have deprived the defendant's argument of its principal force. But the revisers in carrying into effect their purpose to condense all then existing statutes as much as possible, combined three separate acts in one section, namely, the acts of 1672, 1874 and 1869. It will be seen that the five lines composing the last mentioned act were condensed into two lines and a half, but the latter we believe was intended as the equivalent of the former and admits of the same construction.

As we do not accept the defendant's construction of the statute, we do not indorse its claim that the railroad structure placed across a highway necessarily renders it defective and unsafe for public travel over it. It may require of the traveler a slower speed and more cautious driving, (which might be equally true of some bridges, bars, or sudden turns in the road,) but if properly placed and maintained with a view to accommodate the public travel over it, we believe it may be made safe for that purpose, with reasonable care on the part of the traveler.

Our view of the statute sufficiently answers all the objections to the declaration, except the claim that it omits to

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allege that the structure was legally placed upon the highway by the defendant, and this it seems to us is answered by the declaration itself. It states in effect that the defendants were incorporated for the purpose and authorized to construct and operate a steam railroad, &c., and had laid down and constructed it at the crossing in question before the act complained of. The pleas in bar also very explicitly aver "that at the time when, &c., they were duly authorized by law to lay down and construct the same at the place and in the manner where and in which they laid down and constructed the same, &c."

Another question presented by the pleadings is, whether the statute applies to the case of a railroad constructed before the intersecting highway was laid out. The defendant, adhering closely to the very letter of the present statute, contends that it does not apply because the highway in this case was placed on the railroad, and not the railroad on the highway. But we think the statute was intended to make one rule applicable to all railroads, and that the words "placed on such road" are not confined to the time when the railroad was first constructed, but refer to the state of things at the time when the injury was occasioned—the question being whether there was at that time on the highway a structure placed there by a railroad company, under authority of law, which caused the injury. We see no good reason for restricting the liability of railroad companies to cases where the highway antedates the railroad. The just ground for exempting the towns is, that a structure is placed on their highways under authority of law which they are powerless to resist, and this reason obliterates all distinctions as to mere priority of location. Whenever a highway is laid out intersecting a railroad, the company owning the latter must take notice of the fact, as well for the purpose of providing a suitable crossing as for the purpose of erecting warning boards and signals, or doing any other acts required by statute for the safety of travelers at the crossing.

And without protracting the discussion by going into a

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detailed statement of the reasons, we say generally that the true interests of the railroad companies and the public, as well as justice to the towns, combine to sanction that construction of the law that imposes the sole duty and undivided responsibility on the railroad companies to provide proper facilities for the passage of vehicles across their tracks at all highway intersections. They must at the same time have an anxious regard for the condition of the tracks for the safe passage of their own trains, and for the travelers having occasion to cross their tracks in the use of the highway. These objects require careful and constant supervision and the substitution of new rails, ties and planks for those which have become defective; and sometimes there will be changes of grade and additional tracks required, and with each change some corresponding changes may be necessary for the safety of those crossing the track on the highway.

One other question remains, in regard to which the advice of this court is desired. At the January term, 1881, of the Superior Court, after demurrer to the plaintiff's declaration had been overruled, the defendant moved for a hearing in damages, which the court allowed, and both parties were fully heard, and the court thereupon assessed the damages at one thousand dollars and made that finding a matter of record. This judgment was afterwards, on the defendant's motion in error, reversed by this court, (49 Conn., 243,) but not on any point affecting the damages. The case was remanded to the Superior Court, and the defendant afterwards filed its present demurrer to the replication of the plaintiff. The question now is, whether, on that demurrer being overruled by the Superior Court under the advice now given, the defendant will be entitled to a new hearing in damages. Without discussing the question we will merely say that, as the parties have once had their day in court on this issue, with every advantage for a fair trial and a just result which they can now have, and with no intimation even that the former was in any respect a mis-trial, we think the damages have been conclusively settled and the question cannot now be re-tried.

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We advise the Superior Court that the declaration is sufficient and the pleas insufficient, and that judgment be rendered for the plaintiff to recover of the defendant one thousand dollars damages.

In this opinion the other judges concurred.

**TALCOTT H. RUSSELL, RECEIVER, vs. WILLIS BRISTOL
AND ANOTHER, EXECUTORS.**

The charter of a life insurance company authorized the trustees of the company at any time at their discretion to establish a guaranty capital, not to exceed \$100,000, to be paid in cash, notes, or approved securities, to be applied, if necessary, to the payment of its debts; if not used, to be returned, and if used, to be refunded with interest from its first surplus receipts. The company was afterwards declared by the insurance commissioner to be insolvent to the extent of \$48,000, and forbidden to issue policies unless the deficiency was made good. The trustees thereupon procured from the stockholders a subscription of \$75,000 as a guarantee fund under the charter, the subscription providing that the subscribers should severally transfer to the company approved securities to the amount of their subscriptions, the income from them to be paid to the "owners thereof;" the company to pay six per cent. for the use of the securities, which were to be used only when the resources of the company were exhausted, and if not used to be returned at the end of three years; a receipt being given to each subscriber for the securities as "payment" of his subscription. The insurance commissioner accepted this guarantee fund as supplying the deficiency in the capital and allowed the company to go on. *B* subscribed \$10,000 to the fund and transferred to the company railroad stock to that amount. He afterwards died, and at the end of the three years the stock was re-transferred by the company to his executors, and by them afterwards distributed as a part of his estate under an order of the probate court. The insurance company was subsequently judicially declared insolvent, and went into the hands of a receiver, who made demand on the executor for the sum of \$10,000, and also for the securities. Held—

1. That *B*'s obligation was for the payment of his subscription in money, and was to be regarded as secured only, and not paid, by the transfer of the stock.
2. That the right of action did not accrue when the stock was transferred by the company to the executors, but when demand was made on the executors by the receiver for the payment of the subscription.

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BILL IN EQUITY for the transfer of certain stocks, an account, the payment of money, and an injunction; brought to the Superior Court. Facts found by a committee and case reserved for advice. The case is fully stated in the opinion.

S. E. Baldwin and T. H. Russell, for the petitioner.

J. S. Beach and H. Stoddard, for the respondents.

PARDEE, J. The legislature incorporated the American Mutual Life Insurance Company in 1847, with power to insure lives. The charter and the amendments thereto provided that its trustees might at their discretion at any time establish, and from time to time re-establish, the whole or any part of a guarantee capital, not to exceed the sum of \$100,000 at any one time, and might require the same to be paid in cash, notes, or approved securities; the same to be used, assessed or negotiated if necessary for the payment of its debts; if not used, to be refunded with interest; if used, to be refunded with interest from its first surplus receipts.

In 1872 the insurance commissioner declared the company to be insolvent to the extent of \$48,678, and forbade it to issue policies unless the deficiency should be made good.

Availing themselves of the provisions of the charter, its trustees on March 17th, 1873, resolved to establish a guarantee fund to the extent of \$75,000, for the purpose of supplying this deficiency, and thereby obtaining permission to continue business.

On that day Willis Bristol was a shareholder in the company and one of its trustees; was its treasurer, knew of its insolvency, participated in the vote to establish the guarantee capital, and had knowledge of the purpose for which it was established. To this capital he subscribed the sum of ten thousand dollars, signing with others the following form of subscription:—

“Whereas, the board of trustees of the American Mutual Life Insurance Company have resolved to establish a

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guarantee capital amounting to seventy-five thousand dollars, under the provisions of the charter of said company and the amendments thereto, and to pay for the use of the same as follows: three per cent. each on the first day of July and the first day of January in each year, for the term of three years:—And whereas it is agreed that said guarantee capital shall not be used or resorted to unless all the resources of said company are exhausted, and that whatever income is derived from the bonds, stocks or mortgages, or other securities transferred to said company as a part of said capital, shall be, when collected by the treasurer of said company, paid to the owners thereof, and the securities be surrendered at the termination of said three years from the 15th day of December, 1872:—Now therefore, we, the undersigned, do hereby subscribe for such amount of said guarantee capital as we respectively set opposite to our names, subject to the terms of said charter and this agreement, and hereby agree to transfer to said company such securities, to the amount of our respective subscriptions, as shall be approved by the board of trustees. And further, we hereby consent that said American Mutual Life Insurance Company may transfer our said securities to the American National Life & Trust Company, whenever said company shall assume the liabilities of the American Mutual Life Insurance Company, as provided in certain special acts of the legislature heretofore passed. Our liability under this subscription shall commence on and terminate three years from said date."

Mr. Bristol transferred to the company two hundred shares of the stock of the Morris & Essex Railroad Company, nearly of the value of \$10,000, and took from himself as treasurer an acknowledgment in accordance with the following form, which had been adopted by a vote of the directors:—

"Received, March 1878, from Mr. in payment of his subscription of dollars towards a guarantee capital of seventy-five thousand dollars for the American Mutual Life Insurance Company, (of which said

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subscription the above is a true copy,) the following securities, to be used as a part of said guarantee capital, according to the tenor of said subscription, and for no other purpose; and all obligation on the part of the subscriber herein named shall cease at the expiration of three years from the 15th day of December, 1872."

On April 15th, 1873, the American Mutual Life Insurance Company transferred substantially all its assets and securities to the American National Life & Trust Company, a corporation chartered by the legislature of this state.

During his life Mr. Bristol received from the corporation the dividends declared upon the shares, and annual interest at the rate of six per cent. upon the sum of \$10,000. He died May 8th, 1875. The defendants, his executors, received from the corporation the dividends and interest subsequently accruing. On December 24th, 1875, the treasurer of the American National Life & Trust Company delivered to L. S. Hotchkiss, one of the defendants, as executor, the certificate for the shares which Mr. Bristol had delivered to the company, with a power of attorney for the transfer; and in June, 1876, these were distributed under an order of the probate court to legatees of Mr. Bristol as a part of his estate.

In 1878 it was judicially determined, upon a proper proceeding for that purpose, that the American Mutual Life Insurance Company and the American National Life & Trust Company were insolvent; the plaintiff was appointed receiver for both; having duly qualified he made a demand in February, 1879, upon the defendants substantially in the following words:—

“Messrs. Leonard S. Hotchkiss and Willis Bristol, executors of the estate of Willis Bristol, deceased:—Gentlemen—Please take notice that I have been appointed by the Superior Court receiver of the American National Life & Trust Company of New Haven, and that as such receiver I am authorized to call in and collect all unpaid subscriptions or instalments thereof due on account of any capital heretofore subscribed for the use of said company, and all

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subscriptions and securities made or pledged for said capital and thereafter improperly refunded or cancelled by said company, or otherwise remaining unpaid, and bring any necessary suits therefor; and that, in pursuance of the power so vested in me by said court, I hereby call in and demand of the estate of Willis Bristol, deceased, and of you and each of you as executors of said estate, payment of the full amount of subscription of said Bristol to the guarantee capital or fund originally subscribed to the American Mutual Life Insurance Company and afterwards claimed by the American National Life & Trust Company, amounting to ten thousand dollars in all, to be paid to me as such receiver on or before the first day of April, A. D., 1879. I also, as such receiver, demand of you and each of you, as executors of said estate, the immediate return of all securities deposited in connection with such subscription, to wit: two hundred shares of Morris & Essex Railroad stock, and of all other securities left in connection therewith. Said company became insolvent prior to October, 1875, and has since continued so, and said securities and said guarantee capital were thereupon required and are required to meet claims against said company. I enclose herewith, in order to prevent any possible question as to the proper party to make this call upon you, a similar call and demand made in my capacity as receiver of the American Mutual Life Insurance Company. A compliance with this call, or that by me in my capacity as receiver of the American Mutual Life Insurance Company, will be deemed by me a sufficient excuse for non-compliance with the other. I hereby present the said demand as a claim against said estate." (Signed by Mr. Russell as receiver of the American National Life & Trust Company.)

Upon their refusal to comply Mr. Russell brought the present bill in equity, asking that the defendants as executors may be ordered to return to him as receiver of one or both of the named corporations the securities transferred by Mr. Bristol to the American Mutual Life Insurance Company; also to make good any deficiency between the value

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thereof and the sum of \$10,000; also to pay interest on \$10,000, the amount of the subscription made by Mr. Bristol to the guarantee capital, from December 15th, 1875; also to account for all income and profits paid to him upon such securities by either corporation; also that the defendants may be enjoined against any transfer of the securities; concluding with a general prayer for relief.

The case was referred for a finding of facts, and upon the finding has been reserved for our advice as to the decree to be passed.

It is the claim of the defendants, first, that Mr. Bristol, at the time of and by the transfer of the shares to the corporation, discharged himself from all obligations imposed by his contract of subscription; and that if the act of the executors on December 24th, 1875, in taking a re-transfer of the shares furnished the basis for a claim against the estate, it accrued at that date, and consequently was barred by the statute of limitations before the bringing of this suit; second, that they are protected by the statute which transfers the legal liability from executors to legatees in certain cases, when the former have delivered property to the latter under an order of a court of competent jurisdiction.

It is true that the corporation acknowledged itself to have received the two hundred shares of railroad stock from Mr. Bristol "*in payment* of his subscription of \$10,000 towards a guarantee capital of \$75,000 for the American Mutual Life Insurance Company," but, in the contract of subscription he required the corporation to say, and it did say, that during the three years immediately following that date it would collect and pay over all dividends declared upon those shares to him, "the owner thereof;" he required it to hold them at all times subject to his right to reclaim them by substituting other satisfactory securities; he required of it the payment of six per cent. per annum upon the amount of his subscription for this use of them; required it to ask his consent to the transfer of them to the American National Life & Trust Company on some unnamed day in the future; and required it to re-transfer these specific shares to him at

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the end of three years. Looking through form to substance, in legal effect Mr. Bristol agreed to supply additional capital to the extent of \$10,000 to the corporation, to be applied to the payment of losses upon policies after the exhaustion of other corporate resources; to supply it as the trustees should call for instalments; and secured the performance of his undertaking by the pledge of shares, of which he was to remain the owner until the trustees should exercise their right to convert them upon his failure to meet their call. With his knowledge and permission the trustees, upon this with other similar agreements, regained from the insurance commissioner the forfeited right to issue policies.

It is quite certain that it was not the expectation of Mr. Bristol to be compelled to pay literally and at once the whole or any part of the sum subscribed by him; that his intent went no farther than to enable the corporation to force payment upon him if its business should prove unprofitable. Therefore the legal effect of the word "payment," in the acknowledgment given by him as treasurer to himself as an individual, is that he had done all that he had agreed to do up to that time; that is, he had so fortified his promise to pay upon call as that the commissioner could legally accept it as capital; the charter authorizing that officer to regard as capital paid, capital promised, protected by approved securities.

The finding is that the American Mutual Life Insurance Company and American National Life & Trust Company both subsequently became insolvent; that the trustees totally neglected their duty to call for the promised capital; that both corporations passed into the keeping of the plaintiff as receiver; and that by order of court he, on February 11th, 1879, officially called for the entire amount of Mr. Bristol's subscription. On that day the liability which had been, as against Mr. Bristol in life and his estate after his death, contingent, became certain; on that date therefore the cause of action accrued. The surrender by the treasurer of the corporation to the executors of Mr. Bristol of the pledged shares in no way affects his contract;

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that stands quite independent of the pledge; and as his estate is more than sufficient to redeem his promises it is quite unnecessary to consider any question as to the disposition made of them.

The Superior Court is advised to render judgment against the defendants as executors for the sum of ten thousand dollars with interest from April 1st, 1879, in favor of the plaintiff as receiver of the American National Life & Trust Company.

In this opinion the other judges concurred.

CLARK M. LOOMIS vs. JAMES D. BRAGG.

The plaintiff and defendant made a written contract by which the latter was to hire a piano of the former, of which the price was to be \$140, for twenty-seven months, for which he was to pay five dollars down and five dollars as rent at the end of each month, until the whole was paid, when the piano was to become the property of the defendant; but if default of any payment was made the plaintiff was to have the right to retake the piano and all the defendant's right to it was to cease and the money paid was to belong to the plaintiff. Held a conditional sale and not a lease.

The defendant's promise in the contract to pay the monthly rent was not to be regarded as a promise for the breach of which the plaintiff could maintain a suit, but the plaintiff's remedy was solely that provided by the contract, to retake the piano, and hold as forfeited all that had been paid.

After paying several instalments the defendant made default of payment. He however for several months promised to pay the amount in arrear and the plaintiff left the piano with him, but he finally failed to make further payment and returned the piano. Held that these promises, being on no new consideration, could not be made in themselves a ground of recovery.

ACTION on a contract for the purchase of a piano; brought to the City Court of the city of New Haven. Demurrer to complaint. Judgment for defendant, (*Studley, J.*) Motion in error by the plaintiff. The case is fully stated in the opinion.

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E. P. Arvine, for the plaintiff.

J. C. Chamberlain, for the defendant.

PARK, C. J. This suit grows out of the following contract between the parties:

“Agreement between C. M. Loomis of New Haven, Conn., and James D. Bragg of Bridgeport, Conn. Said Loomis agrees to rent, and said Bragg agrees to hire, one Albert W. Ladd & Co. piano, No. 1807, price \$140, (cash \$5, balance \$135,) for the term of twenty-seven months from the fifth day of January, 1881, at the rent of five dollars per month, payable on the fifth day of each month, in advance. And it is agreed that if the rent and interest shall be paid punctually according to agreement, said instrument shall be the property of said Bragg at the end of said term. And further, if said Bragg shall neglect to pay the rent and interest falling due at any time, said Loomis shall be at liberty to enter the dwelling house or premises where said instrument may be, and take said instrument into his possession, and the money already paid shall belong to said Loomis. And said Bragg is held responsible for all damages, except the usual wear and tear, and to pay all taxes and insurance on said instrument. The same is not to be removed from the place of delivery without permission from said Loomis. Dated at Bridgeport, Jan. 5th, 1881.”

The instrument was delivered by the plaintiff, and monthly instalments were paid by the defendant under the contract up to the month of May of the same year, when the defendant made default of payment, and continued to do so till the month of October following, when he absolutely refused to go further under the contract, and notified the plaintiff to remove the piano, which was done. During the time that default of payment was being made, the defendant orally renewed his original promise whenever a payment became due, and in consequence of this the plaintiff suffered the piano to remain in his possession notwithstanding the default.

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These facts are set forth in the plaintiff's complaint, to which the defendant demurred; and the question is—do they sustain the claim for damages made in the first count of the complaint? Or do they support the second count, which claims a reasonable sum as compensation for the use of the piano during the time, not covered by his payments, that the defendant had the use of it? Or do they sustain the plaintiff's claim that the defendant shall pay the unpaid instalments provided for in the contract as set forth in the third and last count?

The contract upon which the complaint is based purports to be a renting of the piano for the term of twenty-seven months at the rate of five dollars per month, but in fact it is an agreement to sell the piano at the end of twenty-seven months, when the sum of \$135 shall have been paid in monthly instalments of five dollars each, together with certain interest, upon condition that if at any time the defendant shall make default of payment when any instalment or the interest upon the unpaid balance shall become due, the plaintiff shall have the right to rescind the contract, and take the piano back into his possession, and that whatever sums shall have been paid shall become the property of the plaintiff. The contract is similar in all essential respects to that in the case of *Hine v. Roberts*, 48 Conn., 267, the only difference being that in that case a melodeon, valued at the sum of fifty dollars, and a note for one hundred and forty dollars, payable at a future day, were given for what the contract termed rent. The court held the contract to be an agreement for the sale of the organ when the contract price for it should have been paid. So here, the terms of this contract are inconsistent with those of a lease, but are consistent with those of a conditional sale. The sum to be paid is the entire present value of the piano, that is, one hundred and forty dollars. That sum, with the interest, is to be paid in a little more than two years, when the instrument would be nearly as valuable as it was at the outset. It is incredible that the defendant would be willing to pay as rent the entire value of the

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instrument in so short a time, or that the plaintiff would be rapacious enough to demand it. Indeed the fact that the piano was by the contract to be the defendant's when the amount should be paid, shows decisively that the monthly sums were to be paid, not as rent, but as the purchase price. Furthermore, it was thought important by the plaintiff that it should be provided that if the defendant should, at any time, fail to pay the stipulated sums when due, he should lose the piano, and that all that had been paid should belong to the plaintiff. There was no necessity for this if the contract was a lease of the property.

We think it clear that the parties stipulated for a conditional sale of the piano, leaving the sale to be consummated in the future when the purchase price should be paid. The plaintiff had the instrument to sell. The defendant desired to purchase it, but was unable to pay the entire price on the delivery of the property. The plaintiff was unwilling to give credit. So the arrangement under consideration was made, by which the plaintiff was enabled to accomplish his object by a conditional sale and be safe, and the defendant to have the use of the piano and pay for it in small sums, at stated times, according to his ability.

Such was the contract: and we are now to consider the rights of the parties under it. The defendant failed to perform it. He made default of payment after having paid a number of instalments. The contract provides for this contingency, by a forfeiture of all the defendant's rights under the contract, and of the sums of money that had been paid. This was considered sufficient protection by the plaintiff when he entered into the agreement, for he provided nothing further. The instalments were to be paid monthly. They exceeded in value the use of the piano for the same time. Surely, the plaintiff was thoroughly protected. Had he exercised his rights when the defendant made his first default in the month of May, this controversy would never have arisen. He would have had no cause to complain. But it is said that he indulged the defendant on his promises to pay the instalments in arrear, till the month

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of October, although he continued to make default during the time; and it is claimed that this gives him the right to recover damages for a breach of the contract; or the fair value of the use of the piano during that period; or the instalments remaining unpaid.

It is not pretended that the defendant was guilty of fraud in making the promises. It must be taken that they were made in good faith, for the contrary is not alleged. Do they alter the case? They were merely the repetition of what the contract stated. The defendant in it promised to pay all the instalments as they should become due. Can a repetition make the promise stronger? The original promise is sufficient to make the defendant pay if he can be made to pay at all. Besides this, there is no consideration alleged for the new promises. Had the complaint set forth that when each default was made the plaintiff was about to exercise his rights under the contract by claiming a forfeiture, when the defendant proposed that if the plaintiff would forego his rights he would pay the overdue instalment, and the plaintiff so agreed and granted the indulgence, and in consideration thereof the defendant made the promise, a different case would have been presented. There would have been something more than a repetition of the original promise. But nothing appears in the complaint beyond the fact that the defendant made the promises and the plaintiff, relying upon them, left the piano in his possession. For aught that appears nothing was said by the plaintiff to the defendant to induce him to make the promises. It does not appear that he made any disclosure of what he intended to do. Consequently the promises are left wholly without consideration.

We think therefore that the demurrer was well taken to the first count of the plaintiff's complaint, for the reason that the plaintiff's remedy is set forth in the contract. He should have reclaimed his piano on the first default. Indeed, the defendant had the option by the contract at any time to surrender the piano and lose the instalments he had paid. There could be, therefore, no claim for damages other than the instalments, which the plaintiff already had.

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We think also that the demurrer was well taken to the second count, for the reason that the defendant held the piano under a special contract, which continued in force until it was surrendered in the month of October, and therefore there could be no implied agreement. And for the same reasons we think the demurrer was well taken to the third count.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

* * *

THE SECURITY INSURANCE COMPANY *vs.* THE ST. PAUL FIRE AND MARINE INSURANCE COMPANY.

Several insurance companies combined to defend against a claim for a loss by fire, agreeing that each should pay such proportion of the expense as the amount of its insurance bore to the whole amount of insurance, and appointing a committee to manage the defence with full power to incur all necessary expense. The plaintiff, one of the companies, was afterwards sued by a person employed by the committee, for his services in the matter; it did not plead in abatement the non-joinder of the other companies, but the fact that the suit was brought was known to the present defendant, one of the companies, which did not request that such a plea be filed; and judgment was recovered against the plaintiff for the whole amount of the claim, besides which it was subjected to considerable expense and cost in the suit. The present defendant had objected to the claim made in that suit as unreasonable in amount and the present plaintiff defended against it on that ground, but it was admitted in the present suit to have been reasonable. The plaintiff afterwards brought a suit for contribution against the present defendant, which was the only company within the jurisdiction of the court, and the policy of which was of the same amount with the plaintiff's. At this time several of the companies had become insolvent or were dissolved and were without assets. The plaintiff had collected a portion of the amount from some of the other companies. Held—

1. That by the agreement the signers subjected themselves to a joint liability to all persons rendering service to their agent, the committee.
2. That the provision that each company should contribute in proportion to the amount of its insurance, operated only as a rule of apportionment among themselves, and did not affect an outside creditor.
3. That although the plaintiff when sued might have pleaded in abate-

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ment the non-joinder of the other companies, it was not bound to do so as against this defendant, without its request, it having knowledge of the suit.

4. That the companies that were insolvent were to be laid out of the case in determining the amount that the other companies were bound to contribute to the plaintiff.
5. That the defendant, being the only company within the jurisdiction of the court, might be sued alone for contribution, and, its policy being of the same amount with the plaintiff's, was liable in the suit for half the amount remaining unpaid.
6. That the defendant was also liable to pay an equal share of the expense and cost to which the plaintiff was subjected in the suit of the creditor, the defendant objecting to the creditor's claim as unreasonable in amount, and it being proper in the circumstances that the plaintiff should not pay it until it had been judicially investigated.
7. That it was not necessary that the defendant should be judicially concluded by that judgment, since, the claim being now admitted to be reasonable in amount, the defendant would have been holden if the plaintiff had paid it without a suit.
8. That the plaintiff and defendant were entitled to contribution from the other companies for what they had paid beyond their shares.

SUIT for a contribution; brought to the Superior Court. The principal allegations of the declaration were as follows:—

1. Prior to the 24th of April, 1874, the defendant with the plaintiff and other insurance corporations, had severally issued policies of fire insurance to Messrs. Taylor, Randall & Co., of Boston, Massachusetts, upon property on Central Wharf in said Boston, the policies of the defendant and plaintiff being each for the sum of twenty-five hundred dollars, and, prior to said date, said insured property had been destroyed by fire, and, on said date, claims were being made by the insured on said policies against the defendant and plaintiff and said other insurance corporations.

2. Prior to said April 24, 1874, the plaintiff and defendant, together with the German Insurance Company, of Erie, Pennsylvania, which had a policy of insurance on said property of \$5,000, and the Mississippi Valley Insurance Company, of Memphis, Tennessee, which had a policy of insurance on said property of \$5,000, the Mechanics and Traders Insurance Company of New York City, the Kings' County Fire Insurance Company of New York, the Frank-

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lin Insurance Company, of Indianapolis, Indiana, the Franklin Insurance Company, of Wheeling, West Virginia, the Lafayette Fire Insurance Company, of New York City, the Adriatic Fire Insurance Company, of New York City, the Oswego & Onondaga Insurance Company, of Baldwinsville, in the state of New York, the Ben-Franklin Insurance Company, of Alleghany, Pennsylvania, the Hibernia Mutual Fire Insurance Company, of Newark, New Jersey, the Globe Insurance Company, of Chicago, Illinois, and the Clay Insurance Company, of Louisville, Kentucky, all which said companies had severally policies on said insured property, each of \$2,500, had determined that the claims made on said policies by the insured were fraudulent and invalid, and on said last mentioned date the plaintiff and defendant and said other insurance corporations mentioned in this article, entered into and signed the following written agreement with each other:

"In re TAYLOR, RANDALL & Co. vs. ST. PAUL FIRE & MARINE INS. CO. ET ALS. The undersigned insurance companies having policies outstanding, issued to Taylor, Randall & Co., upon property on Central Wharf, Boston, upon which claims have been made against said companies, do, in consideration of one dollar by each paid to the other, and divers other good and valuable considerations, mutually covenant and agree to and with each other as follows, that is to say, the said companies will unite in resisting the claim made upon said policies, and on each thereof, and in the defence of any and all suits and legal proceedings that have been or may be instituted against any of said companies upon any of said policies, and will, when and as required by the committee hereinafter mentioned, contribute to and pay the costs, fees and expenses of said suits and proceedings pro rata, that is to say, each company shall pay such proportion of said costs, fees and expenses as the amount insured by said company shall bear to the whole amount insured on said property by all the companies subscribing to this agreement; the management and conduct of said resistance to said claims and defence of said suits and proceedings shall

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be and is fully entrusted to and devolved upon a committee to be composed of W. H. Brazier, of the city of New York, Charles W. Sproat, of the city of Boston, James R. Lott, of the city of New York, and L. S. Jordan, of the city of Boston; which committee shall have full power and authority to employ counsel and attorneys to appear for said companies and each thereof and defend said suits and legal proceedings, and to employ other persons for other services relative thereto, and to assess upon and demand and receive from such companies from time to time, as such committee shall deem proper, such sum or sums of money, for the compensation of such counsel and attorneys, and such other persons, and all other expenses of such defence of said suits, as said committee shall deem necessary and expedient; such assessment upon and payment by each of said companies, to be pro-rata as above mentioned. Each and every of said companies shall fully and faithfully adhere to this agreement, and shall refrain from any act or proceedings in reference to such claims or suit or the defence thereof, that can or may in anywise defeat, obstruct or interfere with the acts or proceedings of said committee relative thereto, and shall at all times furnish to said committee any and all papers, information and assistance in and about such management and conduct of such resistance and defence, as may be in the possession or power of said companies respectively and as may be desired by said committee. In witness whereof, the said insurance companies have subscribed this agreement, the 24th day of April, 1874."

3. At the time of the execution of said agreement suits were pending in Massachusetts against the Franklin Insurance Company of Indianapolis, and the Clay Insurance Company of Kentucky, and the defendant, and the caption of said agreement refers to such suits.

4. Mr. Edward T. Woodward, of said Boston, was duly employed, under said agreement, on behalf of the subscribers thereto, to assist in the defence of said suits as an expert on sundry matters therein involved and for other purposes, and in pursuance of such employment the said

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Woodward rendered great and valuable services in the defence of said suits.

5. After long and exhaustive trials the plaintiffs in those suits were beaten on the merits of the controversy, and it was established as the result of said suits that the plaintiffs therein would not be able to enforce their claims against the subscribers to said agreement.

6. At the close of said suits said Woodward presented to the committee mentioned in said agreement a bill for his services, amounting to the sum of \$5,000, which bill was approved by said committee and was reasonable, and was so adjudged by the United States Circuit Court as below stated.

7. In a reasonable time thereafter said committee levied an assessment upon the companies who were parties to said agreement, to pay the bill of said Woodward and other expenses incurred in said suits, but no company paid its assessment; each of said companies, including the defendant, alleging the bill to be unreasonable in amount.

8. In the year 1879 said Woodward sued this plaintiff in said Boston, to recover for his said services, and thereafter such proceedings were had as that in the United States Circuit Court for the First Circuit, held in Boston, in January, 1880, said Woodward recovered judgment against this plaintiff for the value of his services so rendered as aforesaid, to the amount of \$5,000 and interest thereon, the whole of said judgment being about the sum of \$5,444.08. Each of said defendants knew of the existence of said suit, and during its progress claimed that said bill was unreasonable in amount.

9. On an execution issued on said judgment, this plaintiff, on March 26, 1881, paid the whole amount thereof, which with interest was the sum last above stated, and this plaintiff was further subjected to the payment of the additional sum of \$943, being for expenses and legal services incident to the trial of said cause.

10. Since the signing of said agreement, and before March 26th, 1881, the said German Insurance Company, the

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said Hibernian Mutual Fire Insurance Company, and the said Globe Insurance Company, representing in all \$10,000 of the insurance on said property, had utterly failed and there were in existence no assets of said companies or of either of them; and the said Oswego & Onondaga Insurance Company had been dissolved under the laws of the state of New York and could not be sued in law or equity in that state and is not within the jurisdiction of this court.

11. On or about May 23d, 1881, the plaintiff made demand upon all the remaining signers to said agreement, including the defendant, that they should contribute according to the amount of their several policies to reimburse the plaintiff what would be legally and equitably due on the facts aforesaid.

12. Some companies, other than the defendant and other than said insolvent companies, have responded to the demand of the plaintiff, so that there remains unpaid of the sum of \$5,444.08, the principal sum of \$2,252.52, and of the sum of \$943, the principal sum of \$400, but the defendant has refused to pay to the plaintiff any sum whatever.

13. All the other signers to said agreement, except the defendant, are without the jurisdiction of this court.

The plaintiff claims equitable relief, and that there be an accounting between the plaintiff and the defendant, and that of the sums paid by the plaintiff as aforesaid, and remaining unpaid, the defendant be decreed and ordered to pay the plaintiff one-half thereof, to wit: the sum of \$1,750; and for such other relief as shall be equitable in the premises.

To this complaint the defendant filed the following demurrer:—

The defendant demurs to the plaintiff's complaint and the matters therein contained:

1. Because it appears from the complaint that the plaintiff was not legally or equitably bound to pay said Woodward any sum of money whatever, upon the account of or for the benefit of the defendant; and that it further appears from said complaint that if the plaintiff paid any money to

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said Woodward or upon said judgment on account of or for the benefit of the defendant, it was paid by the plaintiff voluntarily, and without the request, knowledge or consent of the defendant.

2. That it appears from the complaint that the defendant was liable to pay said Woodward, either at law or in equity, the sum of about three hundred dollars and no more; and that if the plaintiff paid said Woodward said debt or said judgment, and had any claim either at law or in equity against the defendant and other parties mentioned in the complaint for contribution, it appears by the complaint that all except the defendant have repaid the same to the plaintiff.

3. That it appears from the complaint that the defendant's liability upon said contract, either at law or in equity, is an individual and separate liability for the defendant's *pro rata* part of the debt described in said complaint, and that the defendant is not liable to contribute for the insolvent companies' liability mentioned in said complaint, and that the defendant is not a surety and did not become liable for any of the other companies' liability mentioned in said complaint.

4. That it appears from said complaint that said contract was executed beyond the jurisdiction of this court with companies that were not then and never have been within the jurisdiction of this court, and that the facts alleged in paragraph thirteen of the plaintiff's complaint give the plaintiff no right to contribution against the defendant.

5. That upon the facts alleged in the complaint the defendant is not liable to pay any part of the costs of the plaintiff's defence against the suit of said Woodward.

6. That it appears from the complaint that the plaintiff was not liable to said Woodward upon said contract for more than its *pro rata* part, to wit, the sum of \$300, and that the plaintiff without objection suffered judgment against itself for the defendant's liability to Woodward, and that the defendant was not a party to said action, and did not consent to it and is not liable to pay or contribute any part of said judgment.

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The case was reserved upon the demurrer for the advice of this court.

W. Stoddard, in support of the demurrer.

1. There was no legal or equitable liability to Woodward on the part of the Security Insurance Company under the agreement for more than its *pro rata* part of the whole sum found due him. As it contested the claim solely upon the ground that the charges were excessive, and did not raise the point that it was not liable for the whole amount, the payment by it of any part of the \$5,000, if owing and due from the defendant and the other companies, was a voluntary payment, and the plaintiff cannot recover from the defendant any part of the sum paid. Phillips on Insurance, § 2,000; *Lucas v. Jefferson Ins. Co.*, 6 Cowen, 635.

2. The contract entered into by the defendant, the plaintiff, and the other insurance companies, fully settles what amount of this sum of \$5,000 each company shall pay. Applying the words of the contract to the \$5,000 due Woodward, it reads: "And will, when and as required by the committee hereinafter mentioned, contribute to and pay said Woodward \$5,000, *pro rata*; that is to say, each company shall pay such proportion (of said \$5,000) as the amount insured by said company (the St. Paul Fire & Marine Insurance Co.) shall bear to the whole amount insured on said property by all the companies subscribing to this agreement." In other words, the St. Paul Fire & Marine Ins. Co. will pay to Woodward $\frac{25}{50}$ (or $\frac{1}{4}$) of \$5,000, which amounts to \$294.10.

3. Having entered into this contract specifying the amount that each company shall pay, and that they are not each liable for the whole amount, they are bound by it, and the plaintiff is not entitled to contribution from the defendant, for either the insolvent companies or those beyond the jurisdiction of the court. *North v. Brace*, 80 Conn., 60; *Dering v. Earl of Winchelsea*, 2 Bos. & Pul., 270; 1 Leading Cases in Equity, (H. & W. notes,) 96, and cases there cited; *Armitage v. Pulver*, 87 N. York, 494; Brandt on Suretyship & Guaranty, § 252.

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4. Before the plaintiff can claim contribution in this case, it must show that the defendant was either jointly or severally bound and holden for the same obligation that the plaintiff was. Under this contract there is no such obligation. The plaintiff was holden and bound to pay a certain distinct sum, (a definite part of the \$5,000,) and no one else was either jointly or severally liable for the same sum; and so the defendant, and each of the other companies signing the agreement, assumed alone and individually a certain distinct sum, and no one company was liable, either jointly or severally, for any of the others.

5. The fact that the other companies are without the jurisdiction of the court, does not entitle the plaintiff to recover from the defendant. Those parties were never within the jurisdiction of the court. The principle upon which contribution exists by one surety against a co-surety, where one of the sureties has become insolvent or has left the state, is, that it was the understanding that all parties should equally bear the burden, and each guarantees that the other shall perform his contract. And where in such a case one co-surety moves from the state, so that he cannot be reached, it is a breach of the contract as it was understood between the sureties, and if a loss occurs, equity says that it shall be borne equally by the remaining parties. *Boardman v. Paige*, 11 N. Hamp., 431. In this case there was no agreement, either expressed or implied, that any of the companies should ever be within the jurisdiction of the court, and consequently there was no breach of the contract which we guaranteed, and therefore we are not liable on that ground.

6. We are not liable for the costs of the plaintiff in defending the Woodward suit. We were not parties to that suit. We did not authorize any defence, and the defence was not for our benefit. *Boardman v. Paige*, 11 N. Hamp., 431; *John v. Jones*, 16 Ala., 454; *Brandt on Suretyship & Guaranty*, § 247.

7. The most that under any circumstances can be recovered against us in this case is \$294.10, a sum in con-

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troversy which is below the jurisdiction of the Superior Court. When it appears from the declaration that the sum to be recovered must be below the jurisdiction of the court, the court will dismiss the complaint. *Grether v. Klock*, 89 Conn., 135; *Hunt v. Rockwell*, 41 id., 51.

J. W. Alling, contra..

1. The right of contribution applies to all cases where two or more persons are liable by contract in the same way to a third person, and such third person compels one to pay the entire obligation. 1 Story Eq. Jur., § 504; 1 Parsons on Cont. (6th ed.,) 31, and note *d*; Brandt on Suretyship, § 220.

2. The various insurance companies were of course co-contractors. Was Woodward's claim against them all? He could enforce his whole claim against all jointly, or any one of them which should not plead in abatement the non-joinder of the others. He was not bound to sue each for a fractional part of his claim. The whole nature of the case and the structure of the contract show that when attorneys or other persons were employed, it was by the committee as agents of all the companies and for the benefit of all. The provision that each company should pay in proportion to the amount of its insurance, was simply a rule of apportionment among themselves, and could not affect a third party having a claim for services. *Kincaid v. Hocker*, 7 J. J. Marsh., 888. It was like the case of a partnership where the apportionment between the partners may be unequal, but where all are liable for a debt owed by it.

3. The plaintiff had a right to look to the solvent companies for the entire contribution. The party paying an entire debt which others are bound to share with him, has a right, in seeking contribution from the rest, to look to the solvent co-contractors, without reference to those who have become insolvent. *Hyde v. Tracy*, 2 Day, 491; *Cary v. Holmes*, 16 Gray, 127; *Van Petten v. Richardson*, 68 Misso., 379. The case of *North v. Brace*, 30 Conn., 60, cited on the other side, rests upon an essentially different state of

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facts. But even in that case the court say (p 72.) "As a general doctrine of equity it is true that where there is an entire debt or duty owed equally by several, the solvent debtors must share equally in any burden thrown upon them by the insolvency of a part of their number." It is a fair and indeed an irresistible inference, that as the companies united in defence of the test suit on the supposition that all were able to pay, now that some are unable to pay their share should be distributed among the solvent parties according to their interests.

4. The companies that are without the jurisdiction of the court are to be regarded in the same way as the insolvent companies and are to be excluded in making a basis for contribution. *Cary v. Holmes*, 16 Gray, 127; *Whitman v. Porter*, 107 Mass., 522; *McKenna v. George*, 2 Rich. Eq., 15. Both the plaintiff and the defendant must seek in other jurisdictions the application of the law of equitable apportionment, until all the solvent companies settle equally according to their respective interests.

5. Whether the costs and expenses growing out of the plaintiff's defence against Woodward's suit can become a subject for contribution, must depend upon whether it was reasonable in the circumstances that that defence should have been made. It is admitted, that the defendant claimed that Woodward's bill was unreasonable in amount, both before his suit and during its progress, and that the defendant knew of that suit. It would therefore have been very imprudent for the plaintiff to pay that bill before it had been established by a competent tribunal, and the reasonable expense of getting the claim adjusted ought to be one of the items of the account in contribution. 1 Parsons on Cont., (6th ed.) 83, and notes; *Marsh v. Harrington*, 18 Verm., 150; *Fletcher v. Jackson*, 28 id., 598. "If the complainant, knowing that the demands were just, and that his co-sureties and himself were bound to pay them, had voluntarily incurred expenses in unnecessarily defending the suits, he would have been without remedy for costs; but from their nature it cannot be supposed that he was fully

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aware of the *bond fides and amounts of these demands, and he owed it to himself and to his co-sureties to see that they were established according to the principles of law*; and that he could not do without incurring the expense of employing counsel." *McKenna v. George*, 2 Rich. Eq., 18.

PARDEE, J. (After stating the facts.) By the terms of the agreement the signers jointly subjected themselves to liability to all persons rendering service at the request of their agent, the committee. And this upon the equitable principle that when several persons desire to bring about the same result, one which will be of pecuniary advantage to each, and agree to unite and make common cause each with all others in the undertaking, and join in the appointment of the same agent for the accomplishment of their purpose, as between themselves each is bound to contribute his proportion to the consequent expense; that proportion to be determined by the number uniting, or by a rule established by themselves, or by such equities as may arise from the circumstances attending the transaction. And, if one of them pays, either upon the judgment of a court or voluntarily, a claim justly due from all, each of the others is under obligation so to contribute to his repayment as that the final result shall be that each solvent person has paid his proportion; the person voluntarily paying the whole assuming the risk of the invalidity of the claim, but not the risk of the insolvency of a joint contractor. The provision in the contract as to payment *pro rata*, is to be read as if it expressed that the division is to be among solvent signers only; and it is applicable to them only; it has no effect upon those serving them; it determines that the expense is not to be divided *per capita* but in proportion to the amount insured by each, to the benefit to be derived by each from a successful resistance to the demands of the insured. Therefore it was in the power of Woodward to make all of them defendants in one suit for his entire claim; he was under no obligation to enforce it in fractions against each separately; nor did he take the risk of loss resulting from the insolvency

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of any. And choosing to sue this plaintiff alone, in the absence of a plea in abatement for non-joinder of the others he might legally have judgment for the whole. And the plaintiff was under no obligation to the others to plead in abatement in the absence of any request, they having knowledge of the suit and an opportunity to join in the effort to defeat it.

Whether the plaintiff gave such notice of the suit to the defendant that the judgment concludes the latter as to the amount due, is of no consequence, since the petition alleges, and the demurrer of course admits, that the bill of Woodward "was approved by the committee and was reasonable." The plaintiff could therefore have safely paid it without waiting to be sued.

This being so, the question arises how the plaintiff can justly call on the defendant to contribute to the expense of defending against that suit. The expense of that defence was about \$900. Why should the plaintiff have incurred this expense in resisting a reasonable claim, and after making an ineffectual resistance why should the plaintiff look to the defendant for its share of that expense? This claim is a plausible one, but the peculiar facts of the case show the groundlessness of it. The plaintiff presumably could not have known that the claim was a reasonable one until it had been investigated in court and so found. But aside from this, it is alleged and by the demurrer admitted, that "the defendant [in this suit] claimed that the bill of Woodward was unreasonable in amount." This being so, it was both reasonable in itself, and due to the defendant, that the bill should not be paid without a judicial investigation, and of course the expense of that investigation should be shared by all the parties interested, especially in view of the original agreement of the several insurance companies to make common cause in the whole matter.

It is of course to be understood that the judgment obtained against the plaintiff by Woodward does not become judicially conclusive upon the present defendant by reason of the propriety of the making of the defence by

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the plaintiff, but the facts have their operation merely in making it reasonable that the expense of that defence should be shared by the parties interested.

Each signer was responsible to Woodward for his entire claim; each was alike exposed to a judgment in his favor for the whole; therefore the duty of payment was upon all alike. It fell to the lot of the plaintiff to be made sole defendant in a suit by Woodward for the whole, and to be compelled to pay it; it is not inequitable for it to put upon any one of its co-signers one half of the burden which it has been compelled to assume. And if it is driven to the necessity of asking a court of equity to compel contribution and can find but one solvent co-signer within the jurisdiction of that court, it is entitled to a decree for contribution to the extent of one half of the amount paid by it. The plaintiff and defendant can each thereafter enforce contribution against co-signers in other jurisdictions, or submit to an equal loss as they may prefer. So far as this jurisdiction is concerned, a burden which two are to bear, will press with equal weight on both.

The Superior Court is advised that the complaint is sufficient.

In this opinion the other judges concurred.

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**WILLIAM BRYAN, Jr., AND OTHERS vs. THE TOWN OF
BRANFORD**

An engineer who has had experience in making plans and estimates for the building of bridges and has superintended their construction, can properly testify as an expert with regard to the probable cost of a bridge, although he has had no experience as a practical bridge builder.

And it does not affect the case that he has obtained the prices of the materials for the bridge from persons who deal in such articles.

Under the statute authorizing the laying out of highways, a highway with a draw-bridge can be laid out over a navigable river.

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The statute (Gen. Statutes, p. 239, sec. 47,) which allows a committee to receive and regard as evidence on the question of the cost of a new highway, a bond for the construction of the highway for a stated price, applied to a highway so laid out.

The act of 1875 (Session Laws of 1875, p. 57,) which provides that such a bond shall stipulate that the work shall be done to the acceptance of the county commissioners, does not repeal, but is to be taken in connection with, the former act (Gen. Statutes, p. 239, sec. 47,) which provides that such a bond shall be conditioned for the doing of the work "in a specified time and manner."

It is no objection to the laying out of a highway on the ground of public convenience and necessity, that a considerable part of the public travel will be for the purpose of recreation and pleasure. The accommodation of that class of travellers is to be considered with that of the rest of the public.

Travel which is limited to the summer months is entitled to less weight in determining whether there is a public necessity, than that which is constant.

Where evidence that should properly have been received in chief has been admitted at a later stage of the trial, the matter is wholly one of discretion, and is not a ground of error.

CIVIL SUIT for the laying out of a highway; brought to the Superior Court. Report of a committee in favor of laying out the highway, remonstrance by the defendants against the acceptance of the report, remonstrance overruled and decree laying out the highway, (*Beardsley, J.*) and motion in error by the defendants. The case is sufficiently stated in the opinion.

J. W. Alling and W. A. Wright, for the plaintiffs in error.

L. Harrison, for the defendants in error.

LOOMIS, J. The questions for review in this case are based upon certain decisions of the Superior Court overruling the defendants' remonstrance to the report of a committee laying out a highway in the town of Branford.

1. The highway was laid across Branford river, which required the building of a bridge with a draw for the accommodation of vessels, and the cost of the bridge became an important question before the committee. Upon this subject the plaintiffs offered the testimony of A. B. Hill and Charles

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H. Fowler as experts. To show their qualifications as such the plaintiffs proved that they were civil engineers by education and profession ; that Hill for some time had been assistant and Fowler chief engineer in the engineer's department of the city of New Haven ; that it was part of their duty to make plans of and estimates for the cost of bridges in the city of New Haven ; that they had had considerable experience for a number of years in making plans and specifications for bridges in that city and its vicinity, and in making estimates of their cost, and also in personally superintending, in behalf of the party for whom they had made plans and estimates, as engineers, the building of such bridges by the various contractors who had undertaken to construct them ; that the market price of materials was gained from those who dealt in them—the price of iron from iron manufacturers and of lumber from lumber dealers—but that they had personal knowledge of the market price of labor required to construct bridges ; and that they had made plans for the construction of the bridge proposed and specifications in detail, the same as described in the bond offered in evidence, together with estimates of the cost.

The defendants contended that these facts did not show the necessary qualifications to enable the witnesses to testify as experts in regard to the cost of the proposed bridge. It was conceded that they had sufficient education and knowledge and were entirely competent to make plans and specifications, but it was contended that the fatal defect in their competency was that they had not actually built bridges. To give plausibility to the objection it was claimed that the meaning of the term "expert" was limited by the strict sense of its Latin derivation—that is, to "a person instructed by experience." But the legal sense of the term has always been much broader. Lord MANSFIELD in *Folkes v. Chadd*, 3 Doug., 157, extended it to "all persons professionally acquainted with the science or practice in question." In Best on Evidence, vol. 2, § 513, it is said that "on questions of science, skill, trade and the like, persons conversant with the subject matter are permitted to give their opinions

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in evidence." And the rule is the same as laid down in 1 Greenleaf's Evidence, § 440. In Stephen's Digest of the Law of Evidence, art. 49, p. 104, it is said that "when there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts." In *Ardesco Oil Co. v. Gibson*, 63 Penn. St., 152, it is said that "while undoubtedly it must appear that a witness called as an expert has enjoyed some means of special knowledge or experience upon the subject in question, no rule can be laid down as to its extent."

In *Spring Co. v. Edgar*, 99 U. S. Reps., 645, it is said that "it is very much a matter within the discretion of the court whether to receive or exclude the evidence, but the appellate court will not reverse the ruling in such a case unless it is manifestly erroneous." But so far from experience being the test of competency, it was held in *Taylor v. Railway Co.*, 48 N. Hamp., 804, *State v. Wood*, 53 id., 484, and *Tuller v. Kidd*, 12 Ala., 648, that a physician may give his opinion as an expert upon a subject concerning which he has had no practical experience and where his knowledge was derived from study alone. The want of experience would of course in many cases affect the weight and credibility of the evidence.

It seems clear that the objection can derive no support from legal authority. And if experience was made an essential qualification, it ought not to be overlooked that the witnesses in question had much experience in estimating the cost of bridges—the very matter in question. But it is said they had no opportunity to verify their estimates by the actual results. It is hardly possible that they could repeatedly be called upon to make these estimates without being informed afterwards of the results, and it would undoubtedly be so where they personally superintended the same work through all its stages, as they did in some cases. It is further said that in estimating the cost of materials they had to inquire of others having the materials for sale. This is true, and would apply as well to the practical bridge

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builder, were he called upon to make an estimate of the cost. It would not do to take the prices paid on some former occasion. They might vary materially. Some inquiry as to the market prices at the particular time in question would be necessary.

In this discussion we have assumed (contrary to several decisions in this state) that the strict rules of evidence apply in full force to trials before committees in highway cases, and yet we find no error in the ruling complained of.

2. The next question is, whether the committee erred in receiving the bond for the construction of the road and bridge.

In the first objection the defendants' sole grievance is that the evidence was not offered in chief. If we assume that by the strict rule of procedure it should have been so offered, yet, as the time and order of admitting evidence during the trial rested in the discretion of the committee, no error can be predicated on this ground. *Doane v. Cummins*, 11 Conn., 158; *State v. Alvord*, 31 id., 46; *Chapman v. Loomis*, 36 id., 459; *Stirling v. Buckingham*, 46 id. 468.

The next objection is, that the statute allowing a bond to be received in evidence does not apply to a case like this, where the proposed highway crosses a navigable river, requiring a bridge over the same with a draw. But the statute (Gen. Stat., p. 239, sec. 47,) allowing the committee to receive such bond and regard it as evidence, in terms applies to every case where an application shall be pending before the Superior Court for the laying out of any highway, and there is no exception mentioned. It would seem therefore that if the committee had a right to lay out the highway at all, they had the right to receive the bond. But the right to lay out a highway, with a draw-bridge, over a navigable river, was established by the decision of this court in *Brown v. Town of Preston*, 38 Conn., 219.

The remaining objections relate to the form or condition of the bond; and here, although several particulars are mentioned and criticised, yet we deem it unnecessary to consider them, except as they are involved in the question

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whether the bond was in compliance with the provisions of the statute. There are two statutes relating to this subject, one found in the General Statutes, p. 239, sec. 47, which requires that the bond "be conditioned to make or alter such highway in a specified time and manner," and the other, found in the session laws of 1875, p. 57, providing that the condition "shall contain a proviso that the highway shall be constructed and graded to the acceptance of the county commissioners."

Now the bond in question specifies particularly the work and the manner of the work, and requires its completion in a specified time, and that it is all to be done "to the acceptance of the county commissioners," and so complies in terms with both statutes. But the defendants earnestly contend that nothing at all should have been mentioned about the work, nothing in respect to the dimensions, materials or construction of the bridge, but only that it should be in every particular such a structure as the county commissioners might accept.

What is this in effect but a claim that the statute first cited is repealed by the last? But no repeal is expressed, and there is no such inconsistency as might imply a repeal. Both statutes can stand together in harmony. Indeed, it seems to us that the last is on its face a mere additional requirement, and not a substitute which excludes the other.

If the defendants' construction is correct, no prudent person would consent to bind himself to build a bridge for a specified sum without mentioning the work he was to do and the materials he was to furnish. There would be no basis upon which to estimate the expense—no guide or standard for the conduct of the work; all would remain uncertain until it was too late to recall the bond, and then a bridge of wood which had been estimated for and expected might be discarded and one of stone or iron required. It seems to us also that the committee, in determining the question of common convenience and necessity, if they are to receive a bond in evidence, ought to know what sort of structure will be built for the sum named; and the town

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also, which is to be burdened with the expense, needs the same knowledge in order to decide whether it will accept the bond or let to others the building of the road. We conclude that both the statutes referred to are in force, and that they mean that the work particularly specified in the bond shall be done to the acceptance of the commissioners.

3. The last point for our consideration involves to some extent the construction of our statute relative to the purposes for which highways may be laid out.

It appeared on the trial before the committee that the proposed road would shorten the distance between Branford Depot and a place in Branford known as Indian Neck, nearly a mile, and that the latter place was a noted summer resort on the shores of Long Island Sound, where there were private dwelling houses and public hotels and boarding houses. After giving to some extent the details as to travel and business between those points, the record adds:— “But the principal feature about Indian Neck has been and is, that it is a popular resort during the warm months of the year for persons from all sections of the country, in and out of this state, with but very few from Branford, in search of health, recreation or pleasure, or all combined, and it is this fact which has led to the development of the real estate, hotel, boarding house and livery business above described.” No evidence as to the condition of Indian Neck, or as to what was done there, or the nature of travel to and from there, was objected to while the evidence was being received, but on the argument the defendants claimed that, in so far as travel to the Neck for pleasure or recreation was concerned, it should not be considered by the committee in deciding the question of common convenience and necessity. But the committee did take into consideration the fact and needs of such travel in connection with the other evidence in the case.

In order to support this objection a very narrow construction of the words “common convenience and necessity,” as used in the General Statute, p. 238, sec. 38, must be given; hence the defendants select the word “necessity” as the

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controlling word and make its legal and literal meaning the same, namely, that which is indispensable. If this is correct there could be no new road to Indian Neck, for the public have an existing way there, and as they have hitherto done without any other so they may as well hereafter; and wherever there is an existing way between two termini that is passable, it would be impossible that another should be indispensable.

We think the meaning of the statute is not to be so restricted. It is very common to give the word "necessary," as used in statutes and in legal propositions, a much more liberal meaning. For instance, the statute which exempts from warrant or execution bedding and household furniture "necessary for supporting life," although seemingly narrowed by the specified object, is held not to refer simply to articles indispensable to subsistence, but to include those of convenience and comfort. *Montague v. Richardson*, 24 Conn., 338. And where persons holding certain relations to others are liable for necessities, the term is not restricted to what is requisite for sustenance, but often includes much more, depending on the circumstances, situation and social position of the parties. *Harris v. Dale*, 5 Bush, 161. So statutes excepting works of necessity from a prohibition of labor on Sunday, are not construed as confining the exception to acts of absolute physical necessity. *Morris v. The State*, 31 Ind., 189; *Flagg v. Millbury*, 4 Cush., 248.

We are aware that some of these cases are put on the ground that a liberal interpretation of the statute should be given in furtherance of the object. But the underlying principle of a liberal interpretation is that it is most reasonable considering the object and circumstances. We invoke this principle as applicable here. The necessity referred to is not absolute, but a reasonable public exigency. The words that precede, namely, "common convenience and," somewhat modify the meaning of "necessity." In *Hays v. Briggs*, 3 Pittsb. (Pa.) 504, under what is known in Pennsylvania as the "Lateral Railroad Act," providing for the

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taking of the lands of individuals for railroads under certain circumstances where it is found "necessary and useful for public or private purposes," it was held that the necessity contemplated by the statute was a reasonable and not an absolute one. And the same statute was construed in like manner by the Supreme Court of that state in *Harvey v. Lloyd*, 3 Penn. St., 331.

In *Dudley v. Cilley*, 5 N. Hamp., 558, REDFIELD, J., in giving the opinion of the court said:—"In determining what constitutes an occasion for laying out a highway for the accommodation of the public, three things are to be considered: 1st, the public exigency and convenience; 2d, the burden that is upon the town or towns; and 3d, the rights of individuals whose lands may be taken for the purpose. And the rule is, that when the public exigency is such that it will justify the taking of the lands of individuals without their consent for the purpose, and will also justify the burden upon the town making the road and keeping it in repair, then there is occasion for a highway. When such a case is shown the rights of individuals must give way to the public convenience and necessity and the town must submit to receive the burden."

The public exigency, though the same in kind, may vary much in degree. A large amount of travel will justify a large expenditure—a smaller amount a less expenditure; and yet the common convenience and necessity may require the road in both cases.

But not to dwell longer in exposition of the statute we proceed to the precise question under consideration. It is not whether pleasure travel alone would justify the laying out of a highway, but whether the fact and needs of such travel may be considered at all in connection with evidence showing still more urgent public demands. The entire amount of lawful public travel to be accommodated must be considered in deciding what the public exigency requires. As the traveler for pleasure or recreation has his rights in the use of a road when made, so his voice may unite with others in making a public demand for a new road. The travel of course which is temporary, and which uses the

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road only a few months in the year, will have much less weight than that which is permanent.

In *Woodstock v. Gallup*, 28 Vermont, 587, it was held that even ornament and the improvement of grounds about a public building might be taken into consideration and regarded in connection with the convenience and necessity of a proposed highway, although alone they would not constitute a sufficient basis for establishing it. This in principle fully sustains our position in the case at bar. In *Higginson v. Nahant*, 11 Allen, 530, the court goes much further than is required for the purposes of the case under consideration. It was there held that the selectmen have authority to lay out a highway wholly upon land of citizens against their consent, entering their land from a highway and returning to it at about the same place where it entered and leading to no other way or landing place, capable of being used for no purpose of business or duty or of access to the land of any other person; and which is laid out with the design to provide access, not for the town merely, but for the public, to points or places in the lands of those citizens esteemed as pleasing natural scenery. HOAR, J., in giving the opinion said:—"We are not aware of any case in which it has ever been held that where there is an amount of travel sufficient to warrant the construction of a road, which permanently seeks a particular avenue, the purpose for which the public want to travel is to be regarded, if the purpose is lawful. The plaintiffs have contended that the purpose for which a road is wanted must be of business or duty in order to create a public exigency. But we think it impossible to go into such refinements. Nahant itself is a town which owes much of its population to its attractiveness for other purposes than business or profit. The passing from place to place is a rightful object of public provision in itself, and the occasions for it are as extensive as the pursuits of life. Pleasure travel may be accommodated as well as business travel."

There was no error in the judgment complained of.

In this opinion the other judges concurred.

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ELLIS B. FOWLER vs. JOSEPH W. FOWLER AND OTHERS.

Where a tenant in common has made necessary repairs upon the property, he can recover of his co-tenants their share of the expense.

Previous to the adoption of the Practice Act assumpsit would have lain in such a case, and a recovery can now be had in an ordinary civil action under that act.

In a suit for a partition or sale of property held in common, the jurisdiction of the court is to be determined by the value of the property.

Whether, if the value is alleged in the complaint, that would not determine the jurisdiction: *Quare.* If no value is alleged the question can be raised by the pleadings.

Where in an action in the Court of Common Pleas by one tenant in common against another, for expenses incurred in repairing the property, the defendant filed a cross-complaint, praying for a sale of the property, and the court found, upon an answer filed by the plaintiff to that effect, that the property was of a value beyond the jurisdiction of the court, it was held that the cross-complaint should be dismissed.

CIVIL ACTION to recover the defendants' share of expenses incurred by the plaintiff in necessary repairs upon property owned by the parties as tenants in common; brought to the Court of Common Pleas. Cross-complaint by defendants, answer to same by plaintiff, finding of the facts by the court, and a reservation of the case for advice. The case is sufficiently stated in the opinion.

C. S. Hamilton, for the plaintiff.

W. B. Stoddard and J. S. Thompson, for the defendants.

CARPENTER, J. The plaintiff is a tenant in common with two others of certain mill property. For himself, and representing also one of his co-tenants as lessee, he made necessary repairs. This action is brought against the other co-tenant to recover one third the expense of such repairs. The facts are found and the case is reserved for the advice of this court.

It is objected that the action will not lie; that such an action could not be maintained at common law; that we

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have no statute authorizing it; and that we have no precedent for it in our reports. Nevertheless we are of the opinion that the action may be maintained. At common law the remedy was by a writ *de reparacione facienda*. That writ, if ever used in this state at all, long since went out of use. We must therefore look for some other remedy. It is true the statute supplies none expressly. Account will lie by statute against one co-tenant who has received the rents and profits, and we suppose it will not be doubted that the defendant in such an action would be allowed the amount expended in necessary repairs. If such expenses actually exceeded the rents received, so that a balance should be due the defendant, the equities of the statute would seem to require that he should recover that balance. In such a case the claims of the respective parties would be mutual, and would pertain to the same subject-matter; and when once litigated it seems reasonable that judgment should be rendered for the balance, whichever way it may be, as in other actions of account.

But however that may be, we entertain no doubt that the plaintiff under the former practice would be entitled to recover in assumpsit, and that under the Practice Act he is entitled to the legal remedy.

The case finds that the repairs were "reasonable and necessary;" so that one third of the expense was for the benefit of the other tenant, Sophia B. Fowler. That expenditure however was not officially made, for by reason of the plaintiff's relation to her and to the property he had a right to make it; and if a request by the defendant is necessary, the law will presume one and hold her liable as in ordinary actions of assumpsit for money paid out and expended. At all events the law will imply a promise to pay her proportion, upon the same principle that it will imply a promise to contribute in cases of joint debts paid by one of the debtors.

The defendant filed a cross-complaint, praying for a sale of the common property. The plaintiff in his answer averred that the value of the property was more than one

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thousand dollars and that the matters prayed for in the cross-complaint were not within the jurisdiction of the Court of Common Pleas. The defendant replied that the property was worth no more than five hundred dollars. On this issue the court found the property to be worth about three thousand dollars, which clearly means that the property is worth more than one thousand dollars.

Had the Court of Common Pleas jurisdiction? We think not. It cannot be presumed that the legislature intended that in every case of a tenancy in common, however great the value of the property may be, the question of a partition or sale should be within the jurisdiction of the Court of Common Pleas; nor on the other hand will it be presumed that in cases where the property is of trifling value the intention was that the Superior Court should have jurisdiction. There is manifestly a jurisdictional limit somewhere.

The statute provides that "all causes in equity wherein the matter in demand does not exceed five hundred dollars," shall be brought to the Court of Common Pleas. Another section gives that court in New Haven County concurrent jurisdiction with the Superior Court in causes wherein the matter in demand exceeds five hundred dollars and does not exceed one thousand dollars. The statute also provides that in suits for redemption or foreclosure the amount of the debt shall determine the jurisdiction. Another statute provides that in actions of replevin the jurisdiction shall be ascertained by adding to the alleged value of the goods the amount of the alleged damages. But the statute establishes no rule in suits for a partition or sale of common property. The obvious meaning of the words "matter in demand," as applied to those suits, is the property sought to be parted or sold, and the value of that property is the test of jurisdiction. As thus interpreted the statute furnishes a plain rule, easily understood and easily applied. In analogy to the statutory rule in replevin and the rule which prevails in cases of a money demand, perhaps the value of the property as alleged in the complaint would

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determine the jurisdiction; and if no value is alleged, as in the present case, the question may be raised by the pleadings.

This view of the case renders it unnecessary to consider the other questions raised on the cross-complaint.

The Court of Common Pleas is advised to render judgment for the plaintiff on his complaint for one third of the sum expended, with interest, and to dismiss the cross-complaint.

In this opinion the other judges concurred.

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HIRAM E. WELTON *vs.* THE TOWN OF WOLCOTT.

The owner of a mill-dam built a wall of stone twenty-three feet above the dam and filled the intervening space with earth, leaving a culvert for the water to pass through, not intending at that time to make any further use of the dam for mill purposes. He then dedicated the embankment for a highway across the river, and it was accepted by the public, and used for several years until it was carried away by a flood. Held that the town in repairing was not bound to restore the embankment, but might construct a bridge for crossing at that place.

TRESPASS ON THE CASE for interfering with the flow of water to a mill, for injuries to belting therein, and for obstructing access to land; also a petition for an injunction against the building of a bridge; brought to the Superior Court, and on facts found, both cases reserved for the advice of this court. The facts are sufficiently stated in the opinion.

W. Cothren, for the plaintiff.

J. C. Webster and *J. O'Neil*, for the defendants.

PARDEE, J. In 1822, Erastus Welton, grandfather of the plaintiff, owned land in the town of Wolcott upon both sides of a stream which he had ponded and turned upon a

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mill-wheel. In that year he built a wall of stone about twenty-three feet above the old dam and filled the intervening space with earth, the water passing through a culvert; and he changed the location of a highway which theretofore had crossed the stream below his dam, so that it thereafter crossed upon this causeway. Concerning this the court finds as follows:—"There was a sufficient opening through said causeway thus constructed for the water of said stream to pass freely and there were no indications of an intention ever again to use said mill-site and stream of water for a mill privilege. I find that the then owner of said premises intended to dedicate said causeway to the public for a highway, and that the public used the same as a highway from that time until the year 1875, (when said use was interrupted by a flood as hereinafter mentioned,) without interruption or objection. I therefore find that the same was accepted by the public, and was in the year 1875 and now is a public highway by dedication and acceptance, there never having been any lay-out." And in a supplemental finding the court says as follows:—"Whether the dedication of the top of the old dam for the purposes of a highway carried with it a right to the town to repair the highway, construct a bridge and erect a railing, is a question of law for the court. I do not find that such a right was dedicated unless included in the dedication for a highway. The flume carrying the water to the mill was not disturbed by the freshet, and the dedication for a highway was not intended to interfere with the water-privilege and was not supposed to have that effect."

Not long thereafter Welton turned the water upon a wheel carrying a grindstone and subsequently a flax-brake. In or near the year 1837 he built a saw mill there, subsequently raising the pond and adding new wheels carrying cider, grist and saw mills. The plaintiff now owns the site and applies the water to one or more of these uses. In 1875 by the use of flush-boards he raised the water; and, a heavy rain falling, a large portion of the causeway was washed away, and the culvert was somewhat injured but

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not destroyed. He then proposed to share with the town the expense of constructing an embankment. Failing an agreement, the town built a bridge upon abutments about thirty-eight feet apart over the space formerly occupied by the causeway, not disturbing the culvert, and the court finds that "after the bridge was completed the agents of the town constructed a railing on the lower side for the protection of the public travel. Such railing was necessary, and in this the town did not act unreasonably. The effect of the railing was to make it somewhat more difficult for the plaintiff to fill in below for a log-way. But that was not the fault of the town." The plaintiff then built a wall from one abutment to the other, at the lower side thereof, so locating the overflow as to discharge water directly against one of the abutments, and this finding its way along the open space under the bridge into his wheel-pit, injured his belting. The court finds that at small additional cost he could have so constructed the overflow and culvert as to carry the water through the embankment outside of the abutment or through the filling, in either case without injury to himself. It also expressly finds that the injury to his property was the "result of his own negligence and folly." The court also says that "it cannot say that the town acted unreasonably towards the plaintiff in constructing a bridge, although the preponderance of evidence is that a solid filling of earth and stone would have been less expensive;" and that if the plaintiff and the town had "agreed to work together and re-construct the embankment the highway might have been restored at less expense to the town and to the advantage of the plaintiff."

Upon the finding therefore in 1822 the then owner in fee of the *locus in quo* made an unqualified appropriation of it to the use of the public as a highway; the public accepted it for such use, acquiring thereby an easement or right of passage over the soil; he retaining the fee, together with all rights of property not inconsistent with the permission given. By such acceptance the public imposed upon itself the duty

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of maintaining the way in a condition of reasonable convenience and safety for travelers. There went therefore with the irrevocable dedication the equally irrevocable permission to the public to exercise its discretion as to the manner in which it would perform that duty. If the rains washed the way it came under no obligation to restore it to its previous form or condition; if the floods carried away the embankment, it came under no obligation to re-build; it performed its whole duty in providing a safe and convenient crossing. In doing this it might consult only its own interests or preferences, with a proviso sufficient for the purposes of this case, namely, that it does not purposely do any positive and unnecessary injury to the reserved rights of the owner. Merely not to have added to the value of those rights is not a wrong cognizable by a court of law. Inasmuch as the court finds that "in the present case the plaintiff made no claim for damages by reason of trespasses to land outside the limits of the highway," this view renders the other questions raised unimportant.

The Superior Court is advised to render judgment for the defendant, both in the action at law and in the bill in equity.

In this opinion the other judges concurred.

LEVI P. TREADWELL *vs.* PETER BROOKS.

The statute (Gen. Statutes, p. 355, sec. 22,) provides that "the executor or administrator of any deceased mortgagee, or any guardian or conservator whose ward is a mortgagee, may, on the payment, satisfaction or sale of the mortgage debt, release the legal title to the mortgagor or party entitled thereto." Held not necessary that the release be of the whole mortgaged property on payment of the whole debt, but that a part might be released on payment of a part of the debt.

A, owning an equity of redemption of only nominal value in a tract of land subject to several mortgages, agreed with *B* to sell him a part of the tract for a price agreed, the proceeds to be applied in part payment of the mortgages. The mortgagees consented to release the portion for the

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payment proposed, which *B* was to mortgage to a savings bank to raise the money to make the payment. The mortgagees thereupon executed a release to *A* of the portion in question, and *A* made a warranty deed to *B*, the papers all being deposited with the savings bank until the transaction was completed. One of the mortgagees however was an administrator and another a guardian, and the treasurer of the savings bank was of opinion that they could not, under the statute, release a part of the mortgaged property, and declined to make a loan on the part unless the whole tract was released. *B* therefore advised *A* to get this done, but *A* was not able to accomplish it and so informed *B*. *B* soon after procured elsewhere the money needed to purchase the part and informed *A* that he had it ready whenever he should make him a perfect title. Thus matters stood until *B* put upon record a caveat, claiming an equitable title to the portion in question and describing the release of a part, as at first proposed, as insufficient. Afterwards *C* purchased the equity in the whole tract at a sale of it by *A*'s assignee in bankruptcy. Upon a suit in equity brought by *C* against *B* to remove the cloud from the title, it was held that the title expected by *B* under the agreement and demanded by the caveat being one which required a release of the whole tract by the mortgagees, which they were not bound to give and which they had not authorized *A* to stipulate for, *B* had not acquired an equitable title to the portion of the land in question.

BILL IN EQUITY to remove a cloud from a title ; brought to the Superior Court. Facts found and case reserved for advice. The case is sufficiently stated in the opinion.

L. D. Brewster and *H. B. Scott*, for the plaintiff.

H. B. Munson and *G. E. Terry*, for the defendant.

LOOMIS, J. This is a petition to remove a cloud upon the title of certain land, occasioned by a caveat signed by the defendant and recorded in the land records of the town, in which the defendant claimed to be the equitable owner, by reason of an agreement for the sale of the land to him by one Isaac W. Ives, owner of the equity of redemption. The land was subject to three mortgages—one to Joseph M. Ives, guardian, for nine hundred and thirty-five dollars, one to him individually for eight hundred and sixty-five dollars, and one to the plaintiff as administrator of Lyman Keeler for three thousand and five hundred dollars. The equity of redemption had no value, and the owner, Isaac W. Ives, was

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a bankrupt; but he obtained from the mortgagees a quit-claim releasing a part of the land from the mortgage so that he might sell it and pay over the proceeds to them. Ives, with this quitclaim deed, met the defendant on the 14th of March, 1878, and made the agreement for the sale of the land in his own name to the defendant. To enable the latter to raise the purchase money, it was understood that he was to obtain a loan from the Waterbury Savings Bank and secure it by a mortgage of the land. Subsequently, on the 4th of April, 1878, Ives and Brooks met at the savings bank to consummate the bargain. The treasurer of the bank drew a warranty deed from Ives to Brooks and a mortgage from the latter to the bank, which were duly executed and acknowledged. But the bank officers would not make the loan to Brooks without first seeing the quit-claim deed, which had been left with Mr. Terry, attorney for the defendant, and could not then be produced. So that the parties separated, leaving all the deeds in the hands of the treasurer of the bank until he could examine the quit-claim deed. If that should be satisfactory he was to furnish the money immediately and have all the deeds recorded. Afterwards during the same day the treasurer obtained the quitclaim, but objected to it on the ground that an administrator and guardian had no power to release any portion of the land mortgaged unless the entire debt secured by the mortgage was paid, and the next day he wrote Ives to that effect, recommending him to obtain another quitclaim of the entire mortgage. After receiving this letter Ives communicated its contents to the defendant, and informed him that the mortgagees had refused to release their entire security for the proceeds of the sale of a single lot, and therefore it would be impossible for him to comply with this new requirement. The defendant replied by letter of April 9th, in which, among other things, he said:—"I understand Mr. Kingsbury has sent you a good and lawful paper since you was here, and the best thing you can do will be to get it signed and return it without delay." This referred to the new quitclaim deed required by Mr. Kingsbury. And on

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the 16th of April, the attorney of the defendant, at his request, wrote that the defendant had raised the money and it was on deposit with Mr. Kingsbury, to be paid to Ives when he should furnish a perfect title, obviously meaning such a title as the treasurer of the bank required. The plaintiff in bringing the present suit, stands not on his title as a mortgagee, which he held as administrator, but upon a title acquired by him individually by purchase of the equity of redemption from the assignee in bankruptcy of Ives.

From this condensed statement of the facts it seems clear that the defendant has no equitable title as against the plaintiff. Had he accepted the title offered he could have successfully resisted all the plaintiff's claims and enforced his own, but as the caveat states and the finding otherwise shows, he refused the offer and demanded just what the treasurer of the savings bank required, namely, a release from the plaintiff and the other mortgagees of their entire mortgage, covering other land than that which he purchased. So far as the plaintiff was concerned he had no right to insist on such a release.

It would have been most unreasonable and unjust to the mortgagees to require them to part with the entire security which they held for the avails of a part, amounting only to a part of the mortgage debt; and neither they nor the plaintiff ever made or authorized Isaac W. Ives to make any agreement of sale involving such consequences.

The quitclaim which the plaintiff and the other mortgagee consented to give had been executed and was exhibited to the defendant when the agreement for the purchase and sale was made, and this was the only basis of Ives's authority and fixed its utmost limits. The unfortunate feature of the contract was not owing to the desire or fault of either party, but wholly to a new and insurmountable obstacle unexpectedly thrust between them by the requirement of the bank treasurer. Brooks could not raise the money without meeting this requirement, and Ives could not procure the release of the entire mortgage with the avails of that part of the mortgage property sold.

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It may be suggested that as the plaintiff and the other mortgagees authorized Ives to sell the land in question and quitclaimed the mortgage as to the portion to be sold, they should be held as authorizing the giving of a good title, or in other words, must be held as promising a valid quitclaim, and if they were mistaken as to their power to release a part of the land upon part payment only of the mortgage debt, they ought to suffer the consequences of their mistake, rather than the defendant, who made the contract for the purchase of the land relying upon a perfect title. This brings us directly to the question whether the quitclaim deed, which the savings bank rejected, would have been effectual to release the incumbrance of the mortgages on the land bargained to be sold to the defendant. The answer depends upon the construction of sec. 22, p. 355, of the General Statutes, Revision of 1875, which is as follows:—“The executor or administrator of any deceased mortgagee, or any guardian or conservator whose ward is a mortgagee, may, on the payment, satisfaction or sale of the mortgage debt, release the legal title to the mortgagor or party entitled thereto.”

We are not aware that this statute has ever been before any of our courts for construction, and it is to be regretted that the counsel on both sides avoided all discussion of this question.

The conclusion of the bank treasurer was occasioned by a strict construction of the language; this was the more prudent course for a bank officer in case of doubt. At first blush it seems plausible to hold that payment of a debt means full payment, and release of the legal title means a full, rather than a partial release, yet we are inclined to favor a more liberal construction. It may be regarded as payment of the debt so far as it equitably rests on the parcel sold, and as to that it is a full release of the legal title. It will often happen that more money can be obtained to apply on the mortgage by selling and releasing the land in parcels to different persons than could result from a sale of the entire tract, and the best interests of the wards will often

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require such a course. We think the statute gives an administrator or guardian all the power necessary for making such a partial release.

Our conclusion therefore is, that the caveat recorded by the defendant is such a cloud on the plaintiff's title as equity will remove. It is found to work a present injury to the plaintiff by preventing the sale of the property, and on the other hand it is of no possible benefit to the defendant, for as we have seen he has no title legal or equitable which he can now enforce. It is against conscience for him to retain his caveat, for it can serve no possible purpose other than a sinister one. 1 Story Eq. Jur., (12th ed.) sec. 700; *Holland v. Mayor*, 11 Md., 186; *Chipman v. City of Hartford*, 21 Conn., 488.

We advise the Superior Court to render judgment for the plaintiff and to deny the prayer of the cross-bill.

In this opinion the other judges concurred.

JOHN PHIPPS vs. HARRIS B. MUNSON AND ANOTHER.

While a suit for the foreclosure of a mortgage was pending the parties made a settlement under which the mortgagor was to pay the costs of the suit and the interest due within thirty days and at once to give the mortgagee a quitclaim deed of the mortgaged premises; the mortgagee to withdraw the suit and lease the premises to the mortgagor for a sum equal to the interest of the debt and to re-convey to him at any time within six months on his payment of the debt; which quitclaim deed and release were given according to the agreement. A tender of the amount of the debt was made after the expiration of the six months. Held—1. That a specific performance could not be decreed, because the money was not tendered within the six months.—2. That the transaction did not constitute in equity a new mortgage, it being clear upon the facts that the parties intended only a right on the part of the debtor to a re-conveyance upon a payment of the debt within the six months.

SUIT for a specific performance of a contract to convey lands, and for a redemption of mortgaged property; brought

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to the Superior Court, and reserved upon facts found for the advice of this court. The case is sufficiently stated in the opinion.

W. B. Wooster and E. B. Gager, for the plaintiff.

J. W. Alling and W. H. Williams, for the defendants.

CARPENTER, J. The plaintiff alleges in his complaint that he was the mortgagor and that the defendant was the mortgagee of the premises described; that in March, 1881, a portion of the mortgage debt being due and unpaid, the defendant brought a suit for a foreclosure; that the parties came together and agreed upon a settlement, as follows:— The plaintiff was to pay the costs of the foreclosure suit and the interest due within thirty days, and was to execute and deliver to the defendant a quitclaim deed releasing all his interest in and to the mortgaged premises to him; the defendant was to withdraw the suit, lease the premises to the plaintiff for a sum equal to the interest of the debt, and was to re-convey the premises to him at any time within six months from the 18th day of March, provided the plaintiff should pay to the defendant the debt, \$1700, with interest. He then alleges a performance by himself and a tender of the debt and interest on the 12th day of September, 1881, and a demand for a re-conveyance of the premises, and a refusal by the defendant to accept the money and re-convey.

The plaintiff claims a judgment that he may be permitted to redeem the premises, and that the defendants may be compelled to re-convey the same upon the payment of the money.

The allegations in the complaint are found true, except that the time limited was six months from the 9th, instead of the 18th of March, and consequently that the tender was not within the six months. It is also found that Munson sold the premises to Dunham, the other defendant, on the 10th of September, 1881.

It must be conceded that the complaint contemplates a

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specific performance and seems to be framed with reference to that mode of relief.

A specific performance cannot be decreed because the plaintiff failed to pay the money within the time, and time is material. It is of the essence of the contract. The plaintiff claims however that his prayer to be permitted to redeem should be granted, on the ground that the transaction between the parties is to be regarded in equity as a new mortgage. In support of this claim he relies upon the familiar principle, that an absolute deed with an agreement to re-convey on the payment of a sum of money, will be treated as a mortgage. The principle itself is not controverted, but its application to this case is denied.

This, as all other contracts, must be interpreted as understood and intended by the parties. The intention of the parties when discovered must be the law of the case.

Did the parties intend to continue in another form the relation of mortgagor and mortgagee? Such an intention is not found in terms, and we think the finding is not equivalent to it. The agreement postponed the payment of \$1,000 for six months, and provided that the note for \$700 should be paid six months before it was due. In respect to time therefore Munson gained nothing but rather lost, while in other respects the risk seems to have been all on his side. At the end of six months, if the debt was not paid, he must again sue for a foreclosure or wait for the plaintiff to bring a suit to redeem. In either case it was practically giving the plaintiff much more time than he contracted for. That is very nearly a contradiction of the plain terms of the agreement. This is a good test. Suppose the plaintiff had proposed to give a mortgage in form to secure a note payable in six months. Can we presume that Munson would have accepted it? If not we certainly cannot presume that he intended by this agreement a mortgage simply.

The whole tenor and scope of the argument precludes the theory that another mortgage was intended. The object of the suit brought by Munson was to put an end to that relation. The object of the settlement, so far as the object

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can be gathered from its terms and the attending circumstances, was to effect a foreclosure by the action of the parties instead of the court. The very purpose of the deed was to destroy and not to create an equity of redemption; and of the agreement to re-convey, to give to the plaintiff, in lieu of an equity of redemption, a right to purchase for a given price within a limited time. A decree of foreclosure at the expiration of the time limited, if the debt was not paid, would have foreclosed the equity of redemption. The expiration of the time agreed upon by the parties, the money not being paid, put an end to the right to re-purchase. The result is the same accomplished by either method.

The parties resorted to an agreement doubtless for the purpose of saving expense. In it we see nothing oppressive, and nothing that contravenes any principle of law or equity.

The intention of the parties seems to be plain on the face of the transaction; and as we entertain no doubt in respect to it we have no occasion to resort to artificial or technical rules of construction for the purpose of construing the agreement. Nor have we any occasion to consider some questions raised by the counsel for the defence. For the reasons already given we advise judgment for the defendants.

In this opinion the other judges concurred.

RANSOM HILLS v. SAMUEL HALLIWELL AND OTHERS.

Where a claim secured by a builders' lien has become barred by the statute of limitations, the lien can not be enforced against the property.

SUIT to foreclose a builders' lien; brought to the Superior Court, and heard before *Beardsley, J.* Facts found, and judgment rendered for the defendants, and motion in error by the plaintiff. The case is fully stated in the opinion.

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W. C. Case, for the plaintiff.

J. W. Alling, for the defendants.

PARDEE, J. In January, 1873, the plaintiff began, and in January, 1875, ceased to furnish materials for and perform labor upon a house for the defendant Halliwell; and in February, 1875, recorded a lien for the value thereof in the records of the town in which the house stood. No part of his claim having been paid, in May, 1881, he asked for a foreclosure. The defendant answered that the plaintiff's claim was barred by the statute of limitations, and that the lien expired with the claim. The court dismissed the complaint, and the plaintiff filed a motion in error.

Upon the lapse of six years the plaintiff's claim was barred; he could not enforce it in any court legal or equitable. The statute gave to his statement, verified by his oath and recorded upon the town records, the effect of a lien in his behalf upon the premises to which he had applied his labor and material; and this security he could obtain not only without action on the part of the owner, but even against his protest; and at any time before the suspension of his remedy upon his claim he could make the security available. But it is quite possible to the legislature to protect a debt during, without prolonging, the period of limitation; to hold the debtor's land within reach of the creditor during six years without vesting the latter with rights therein or thereto of longer duration; and this, so far as the language of the statute is concerned, is the full measure of benefit which it confers. It neither directly extends the time within which the creditor may enforce his remedy, nor gives him any additional right or cause of action having longer life.

The statute provides that the "premises may be foreclosed * * * in the same manner as if held by mortgage." Thus the outcome of liens and mortgages alike may be that land pays debts. But because of the fact that liens and mortgages may each be enforced through a court of equity we

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are not to say that this plaintiff has all the rights of a mortgagee; we are not to enlarge the statute or confer upon him a new right of action by construction. By recording the statement of his claim the plaintiff acquired no present title to the land, no right to possession, and of course no right to an action for the recovery of possession; no right, in short, for the enforcement of which he could have any standing place in a court either of law or equity after the expiration of six years, and although the complaint is by statutory permission addressed to the equitable side of the court, it remains in fact and effect a proceeding for the collection of a debt after the creditor has allowed time to suspend his remedy. There is strictly speaking no necessity for equitable interference; no fraud to be relieved against; no right lost by mistake to be recovered; only a case of unexplained omission to enforce a legal right by legal process. And, when the demand is strictly of a legal nature, a court of equity in determining the question whether or not it will hear the complaint, imposes upon itself the same limitations as to time as are in like cases imposed by statute upon courts of law.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

**JOHN ELWELL AND ANOTHER vs. CHARLES S. MERSICK
AND ANOTHER.**

Upon the question whether certain iron bought of *M. & Co.*, who were iron brokers, was sold as their own or for some other party, the court charged the jury that if they should find that *M. & Co.* were brokers and as brokers selling such iron at the time, and that the purchaser knew this, it would of itself be evidence of notice to the purchaser that they were not the owners but were selling for some one else. Held to be erroneous. The question whether the loss of a document has been satisfactorily proved, so that secondary evidence of its contents can be admitted, is wholly one of discretion with the judge trying the case, and can not be reviewed on error.

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It is enough if the preliminary proof establishes a reasonable presumption of the loss of the document.

Where the original paper is in the hands of a third person, out of the jurisdiction of the court, secondary evidence of its contents is admissible.

This rule applied to a letter-press copy of a telegraph dispatch, accompanied by proof that the dispatch was sent.

Also to invoices of goods, when the originals were on file in the custom house in another state.

CIVIL ACTION for iron sold; brought to the Court of Common Pleas, and tried to the jury before *Torrance, J.* Verdict for the plaintiffs, and motion for a new trial and in error by the defendants. The principal points decided will be sufficiently understood from the opinion.*

H. E. Pardee, in support of the motions.

C. S. Hamilton, contra.

LOOMIS, J. This action was brought to recover the balance due upon a bill for iron which the defendants, through their agent, J. O. Carpenter, ordered of McCoy & Co. of New York, and the sole contention upon the trial was whether they should account with the present plaintiffs or with McCoy & Co. as the principals in the transaction. If the former was their duty then a small balance was admitted to be due the plaintiffs; but if the latter, then from other transactions with McCoy & Co. a right of set-off had accrued, sufficient in amount to cover all that was due for the iron in question.

The defendants offered evidence tending to prove that the principals were McCoy & Co., and that neither they nor Carpenter had any knowledge that the iron in suit came

* Certain questions of evidence are decided which are entirely special in their character and involve no general principles, but which would require for a full understanding of them such an extended statement of the facts, including some documentary evidence, that the reporter does not feel justified in giving up the space necessary for it. He also finds it impossible to carry into the head note any intelligible statement of these points.

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from or was bought of the plaintiffs. To impeach this defence the plaintiffs offered McCoy as a witness, who testified that McCoy & Co. (of which firm he was a member) were dealers in hardware, commission merchants and iron brokers, and had a place of business at 132 Duane street, New York, and that Carpenter had frequently requested them, both before and at the time of the transaction in question, to obtain prices of iron from England for his benefit and that of the defendants.

Among other things the court, at the request of the plaintiffs, charged the jury as follows:—"If you find that McCoy & Co. were brokers and selling as brokers this kind of goods at the time the sale is claimed to have been made, and either the defendants or Carpenter knew that they were brokers, that of itself is evidence of notice to the defendants that McCoy & Co. were not the owners of the iron in question and that it belonged to some one else."

We think the jury would naturally receive these instructions as meaning that mere knowledge on the part of either Carpenter or the defendants that McCoy & Co. were brokers in this kind of business, was equivalent to proof that they had actual knowledge that the particular iron in question did not belong to McCoy & Co., but to some one else. It needs no more than the mere statement to show that the instructions were misleading. Persons known to be brokers in a particular business may, and it is notorious that they often do, engage in transactions entirely on their own account and deal in goods similar to those which they also buy and sell on commission for others. If the word "only" had been inserted after the word "brokers" wherever it is used in the charge it would have avoided our objection, and it is most probable that the court had such a qualification in mind but unwittingly omitted to express it.

The other objections to the charge we consider untenable.

The record presents for our consideration several questions of evidence. We will depart somewhat from the order as given in the record to consider first the ruling of the court excluding evidence of other transactions between

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McCoy & Co. and the defendants or Carpenter, because that evidence apparently had some bearing upon the facts upon which the charge was predicated, and some reference to the facts stated by McCoy above referred to.

The record states that the defendants as part of their case offered in evidence the writings annexed and marked "S," conceded by the defendants not to refer to the iron in suit, nor to any iron purchased from the plaintiffs, and other writings of similar character, for the purpose of showing the course of dealing between the witness McCoy and the defendants, and to contradict his testimony as to his being agent for the plaintiffs in selling the iron in suit.

None of the writings referred to except exhibit "S" are given, and the bill of lading, the invoice, and statement therein referred to, are not given, but so far as appears it was on its face a transaction between McCoy & Co. and Carpenter. It does not contradict any specific statement on the part of McCoy, but as the obvious purpose of his testimony was to show that his firm did not act for themselves but for others, and to charge the defendants and Carpenter with notice of that fact, we are inclined to think the excluded testimony might have shown such a course of dealing as might have impaired somewhat the effect of McCoy's testimony. But as the nature of the testimony excluded does not clearly and fully appear, we do not say that this of itself would furnish sufficient ground for a new trial. Our discussion may have the effect to call the attention of the court more particularly to the nature of the testimony in the event of another trial.

The ruling of the court admitting oral testimony as to the contents of the letter from the plaintiffs authorizing McCoy & Co. to act as their agents, was clearly right. The sole objection was that the loss had not been sufficiently proved. This was a preliminary inquiry addressed to the discretion of the judge. 1 Greenl. Evidence, § 558; *Walter v. Latham*, 12 Conn., 392; *Stowe v. Tuerner*, L. R., 5 Exch., 155. And although this court may revise the ruling of the court below in any matter of law, yet where that court, upon

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legitimate testimony tending to show it, has found the fact of loss, we do not see how this court can review the question in respect to the weight of the testimony. *Durgin v. Danville*, 47 Verm., 95.

But if we were to review and weigh the testimony on this point we should reach the same conclusion. It is sufficient if the preliminary proof establishes a reasonable presumption of the loss of the written evidence. *Harper v. Scott*, 12 Geo., 125. And very slight evidence has been held sufficient. *Turner v. Moore*, 1 Brev. (S. C.), 236; *Flinn v. McGonigle*, 9 Watts & S., 75. In *Kelsey v. Hanmer*, 18 Conn., 311, it is held sufficient if the party offering the secondary evidence has done all that could be reasonably expected of him, under the circumstances of the case, in searching for the original instrument. See also *Waller v. Eleventh School District*, 22 Conn., 326.

The letter press copy of the cable dispatch sent by McCoy & Co. to Isaac Jenks & Sons, as claimed by direction of the defendants' agent, bearing a message to the plaintiffs, we think was clearly admissible, including also the translation and the letter confirming the dispatch. Where the original paper is in the hands of a third party, out of the jurisdiction of the court, secondary evidence of its contents is admissible. *Shepard v. Giddings*, 22 Conn., 282.

We think these papers were relevant evidence upon the issue as to agency, and also because the plaintiffs introduced other evidence to show that these messages were sent pursuant to the direction of the defendants' agent.

The only question of any importance which remains relates to the ruling of the court, denying the defendants' motion to strike from the deposition of Carpenter exhibits 1, 3 and 4, and the ruling admitting them in evidence. Exhibit 1 was a copy of the original specifications for the purchase of the iron in suit. After the court had stricken off the caption which contained the names "Elwell & Jenks," and which might serve to charge Carpenter or the defendants with notice that the iron was to come from the plaintiffs, there was nothing left but the items as to the iron

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ordered, which were subsequently admitted to be correct. The items were identical with those in exhibit 10, which had been introduced by the plaintiffs without objection so far as appears from the record. No harm then came to the defendants on that account even if it was in strictness no part of the deposition.

Exhibits 3 and 4 were copies of the invoices covering the two orders for the identical iron in suit. Now these copies were submitted to the deponent, Carpenter, on his cross-examination for the purpose of refreshing his memory, and to induce him to qualify or retract statements he had made in chief. And a reference to this part of the deposition will show that the purpose of the cross-examination was accomplished. For instance, it was shown that exhibit "A," which the defendants had introduced and which the deponent had sworn to be a true statement of the specifications made by him for the purchase of the iron in question, was not entirely correct, that it embraced part of an entirely different transaction, and that the iron in suit was obtained upon two orders or specifications instead of one; also that invoices like exhibits 3 and 4 containing the words "Bought of Elwell & Jenks," were seen or received by him. This last admission tended to show that the witness was mistaken when he testified that he knew nothing of the plaintiffs in the transaction. Now without annexing these exhibits the answers of the witness upon the cross-examination could not be clearly understood.

But if we should hold that these papers were not legitimately a part of the deposition no harm was occasioned by the refusal of the court to strike them out, for the reason that these copies were offered by the plaintiffs and properly received as evidence. As to the original invoices, we understand the defendants' counsel to admit that they would be proper evidence. They were parts of the *res gestæ* and were files and entries made in the discharge of official duty and therefore admissible. 1 Greenl. Ev., § 115.

It is insisted however that it was erroneous to receive mere copies. But it seems that the originals were on file in

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the custom house in New York, as required by the laws of the United States. The case therefore is within the principle of *Shepard v. Giddings*, supra, and the copies would be admissible on that ground. Moreover, McCoy testified that he could not obtain the originals to bring to New Haven and that he made the copies that were offered from the invoices on file in the custom house.

There is in the case a motion in error which may be disposed of without particular discussion. It is predicated wholly on the ruling of the court sustaining a demurrer to two motions filed by the defendants twenty-one days after verdict and final judgment. One motion was to set aside the verdict and for a new trial, and the other in arrest of judgment and for a new trial—both based on a claim of newly discovered evidence, but with no allegation to show by what witness or evidence the claim could be sustained. There was no error in overruling motions so irregular and unprecedented in form, and so groundless in allegations of essential fact.

A new trial is advised.

In this opinion the other judges concurred.

**JOHN A. WILLIAMS AND OTHERS *vs.* GEORGE A. BROOKS
AND ANOTHER.**

The plaintiffs were partners under the name of "D. F. Tayler & Co.," and for several years had manufactured and sold hair-pins, which were well known and had a ready sale as "Tayler's Hair-pins" and "D. F. Tayler & Co.'s Hair-pins," the device on the packages, which were put up in pink and yellow wrappers, being used exclusively by them and being well known to the trade. The defendants were also engaged in the manufacture and sale of hair-pins and had procured from one L. B. Taylor the right to mark their packages "L. B. Taylor & Co.," to which was added the words "Cheshire, Conn." In a suit for an injunction against the use of their device it was found that "the size and color of the labels and wrappers and the device printed thereon used by them

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resembled the plaintiffs' labels, wrappers and devices thereon, to such a degree that they were liable to deceive careless and unwary purchasers who buy such goods with but little examination, but that purchasers who read the entire trade mark and label could not be deceived. It was further found that the defendants adopted the label and device in good faith and in the belief that they were not infringing the plaintiffs' rights." Held that an injunction should be granted. (One judge dissenting.)

And that the injunction should be "against such a use by the defendants of the name of "L. B. Taylor & Co.," in connection with any device upon pink or yellow wrappers inclosing hair-pins of their manufacture, as that the combination would be liable to lead purchasers to believe that hair-pins manufactured by them were manufactured by the plaintiffs. The defendants were not excused for the use of the label and device by the fact that they acted in good faith and believed that they were not infringing the rights of the plaintiffs. The injury to the plaintiffs remained the same.

The purpose to be effected by an injunction in such a case is not primarily to protect the purchaser, but to secure to the manufacturer the profit to be derived from the sale of his goods to all who may desire and intend to purchase them.

And held that, for the purpose of proving that the defendants' packages with their labels so closely resembled those of the plaintiffs as to mislead an ordinary purchaser, wholesale dealers in hair-pins might testify as experts.

SUIT for an injunction against the use of a trade-mark and for an account and payment of profits; brought to the Superior Court. Facts found by a committee, and case reserved, upon the report and a remonstrance against its acceptance, for the advice of this court. The case is fully stated in the opinion.

C. R. Ingersoll and H. E. Pardee, for the plaintiffs.

H. Stoddard and H. L. Hotchkiss, for the defendants.

PARDEE, J. The plaintiffs are now, and for ten years last past have been, partners under the name and firm of D. F. Tayler & Co., at Birmingham, England, manufacturing among other articles hair-pins of different sizes and qualities, some of them known as "best double japanned," "plain" and "curvilinear," these were gathered into ounce packages, the curvilinear in pink, the plain in yellow paper; these were made into pound packages; these last into pack-

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ages weighing six, twelve and eighteen pounds, wrapped in brown or drab paper, and in this last form were brought into the United States, where by reason of their superior quality they had a good reputation and ready sale under the name of "Tayler's Hair-pins," "Tayler's Plain Hair-pins," "Tayler's Curvilinear Hair-pins," and "D. F. Tayler & Co.'s Hair-pins."

The device or trade-mark printed upon the wrapper of each ounce package has been used exclusively by the plaintiffs during the past ten years upon their pins sold in the United States, and has become, and is, in combination with the pink and yellow wrappers, well known to the trade. The device upon each ounce package can be seen only in part when these are gathered into pound packages.

Since 1879 the defendants have manufactured, put up, and sold in the United States, curvilinear and plain hair-pins in ounce packages; the former in pink and the latter in yellow wrappers, upon which there is the printed statement that the hair-pins were manufactured by L. B. Taylor & Co., Cheshire, Connecticut, and the finding is that "the size and color of the labels and wrappers and the trade-mark or device printed thereon on the ounce packages used by the defendants * * resemble the plaintiffs' labels, wrappers and devices thereon used on ounce packages * * to such a degree that they are liable to deceive careless and unwary purchasers, who buy such goods hastily and with but little examination; but purchasers who read the entire trade-mark and label on the defendants' goods cannot be deceived, nor mistake the defendants' goods for the plaintiffs'." The defendants used their label with full knowledge of the plaintiffs' trade-mark and of the reputation of their hair-pins in the United States.

All manufacturers of hair-pins put them in ounce packages, combining the ounce into pound, and the pound into packages of six or more pounds; and many inclose the ounce packages in pink and yellow paper.

Generally, the defendants sold their hair-pins to jobbers in six pound packages or more, rarely retaining them in ounce

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packages. Nothing in the appearance of the six pound packages would mislead jobbers or wholesale dealers as to the place of manufacture.

The defendants have always sold their pins as of domestic manufacture, and for a less price than that obtained by the plaintiffs; and when their ounce packages are looked at separately, the words "Cheshire, Conn." plainly appear; but when these are gathered into pound packages the whole of the printed label is not seen.

In 1869 Levi B. Taylor and his father Milo A. Taylor were manufacturing hair-pins in Massachusetts as partners under the name of L. B. Taylor & Co., and inclosing ounce packages in wrappers having printed thereon a label substantially like the one of which the plaintiffs now complain. In that year, upon the death of the father, Levi B. Taylor sold the tools, machinery and stock, together with a quantity of these wrappers, with the right to use the same, to the Connecticut Cutlery Company of Naugatuck in this state, and subsequently became president thereof. In 1875, when the defendants began to manufacture hair-pins at Cheshire in this state, Levi B. Taylor closed his connection with the Connecticut Cutlery Company, and became and still continues to be a traveling salesman for them, his remuneration depending upon the amount of sales effected by him; and it was orally agreed between them that they should have the right to use the name of "L. B. Taylor & Co." upon such hair-pins of full weight as they should manufacture and that he should have the exclusive sale of them. Both parties have observed this contract, and under the authority thus given the defendants placed the name of "L. B. Taylor & Co." upon packages of hair-pins; the name being printed in imitation of the signature made by L. B. Taylor.

In 1879, the defendants having manufactured and sold hair-pins inclosed in a wrapper upon which was printed a device and a statement that the pins were manufactured by "L. B. Taylor & Co.", and which resembled the one used by the plaintiffs, the latter claimed damages for the injury

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resulting therefrom to their business. A compromise was effected, and as part consideration therefor the defendants signed an agreement thereafter to desist from any infringement of the plaintiffs' legal or equitable rights in or to their device within the United States. The committee annexed a copy thereof to his report, marked as exhibit 18.

The device and label complained of were subsequently adopted by the defendants upon the advice of counsel, in good faith, and in the belief that it is not an infringement of the plaintiffs' rights.

Conceding as a general rule to all persons the privilege of selecting the name under which they will transact business, yet the defendants have no right to destroy or diminish the property of the plaintiffs in the name of "D. F. Tayler & Co." and in the device and vignette with which it is connected, applied to the manufacture and sale of hair-pins, by so printing the name of "L. B. Taylor & Co." not borne by either of them, but purchased solely for use in connection with this particular branch of their business, as part of a device and vignette upon a pink or yellow wrapper inclosing an ounce of hair-pins, as that their entire device shall so closely resemble that of the plaintiffs as to be liable to deceive careless and unwary purchasers; and this regardless of the fact that the defendants believed their manner of use of the name and vignette to be within the law; for the injury to the plaintiffs remains the same.

In *Croft v. Day*, 7 Beav., 84, the Master of the Rolls said (p. 89): My decision does not depend upon any peculiar or exclusive right the plaintiffs have to use the name of "Day & Martin," but upon the fact of the defendants using their name in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself, to which he is not in fair and honest dealing entitled. * * He has the right to carry on the business of a blacking manufacturer honestly and fairly; he has the right to the use of his own name. I will not do anything to debar him from the use of that or any other name calcu-

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lated to benefit himself in an honest way; but I must prevent him from using it in such a way as to deceive and defraud the public."

In *Thorley's Cattle Food Co. v. Massam*, 42 Law Times, (N. S.,) 851, BRAMWELL, L. J., said: "It is said it is hard if a man has the name of Thorley that he cannot make food and call it 'Thorley's Food.' So he may, but if unfortunately for him some preceding Thorley has carried on the business of making cattle food in such a way that by the name "Thorley's Cattle Food" is understood the manufacture of that man, then the second Thorley, or the man who assumes his name, must take care so to conduct his business that he is not mistaken for the original Thorley, and if he wilfully, or even I should say without wilfulness, does carry on his business so as to be mistaken, he must be restrained from doing it; and really there is no hardship upon him at all."

In *Holloway v. Holloway*, 13 Beav., 209, the Master of the Rolls said: "The defendant's name being Holloway he has a right to constitute himself a vendor of Holloway's pills and ointment, and I do not intend to say anything tending to abridge any such right. But he has no right to do so with such additions to his own name as to deceive the public and make them believe that he is selling the plaintiff's pills and ointment."

The purpose to be effected by this proceeding is not primarily to protect the consumer but to secure to the plaintiffs the profit to be derived from sale of hair-pins of their manufacture to all who may desire and intend to purchase them. It is a matter of common knowledge that many persons are in a greater or less degree careless and unwary in the matter of purchasing articles for their own use; but their patronage is not for that reason less profitable to the manufacturer; and when such persons have knowledge of the good qualities of the plaintiffs' hair-pins and desire to purchase them, the law will not permit the defendants to mislead them.

In *Meriden Britannia Company v. Parker*, 39 Conn., 450, the finding is that the respondent's stamps "resembled the

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petitioners' trade-mark * * to such a degree that they are calculated to deceive and do deceive unwary purchasers and those who buy such goods hastily and with but little examination of the trade-mark, * * but purchasers who read the entire trade-mark on the respondent's goods * * cannot be deceived." The court said: "The fact that careful buyers are not deceived does not materially affect the question. It only shows that the injury is less, not that there is no injury. Another class of purchasers to whom large quantities have been sold are deceived. Such purchasers perhaps will have no reason to complain, as they, if they are injured by the deception, must attribute the injury to their own want of diligence. But the petitioners stand on entirely different ground. No amount of diligence on their part will guard against the injury. An injunction is their only adequate remedy; and to that we think they are entitled."

In *Singer v. Wilson*, 3 L. R., Appeal Cases, 376, Lord O'HAGAN said; "I think we should be cautious in holding that although a person of intelligence and observant habits might, in a case like this, by exercising reasonable vigilance, escape misleading, there should be no restrictive interference to prevent others from being misled. It is a question of degree, of more or less; there can be no rigid rule, and the special facts must be considered in every case. There are multitudes who are ignorant and unwary, and they should be regarded in considering the interest of traders who may be injured by their mistakes. If one man will use a name, the use of which has been validly appropriated by another, he ought to use it under such circumstances and with such sufficient precautions that the reasonable probability of error should be avoided, notwithstanding the want of care and caution which is so commonly exhibited in the course of human affairs."

The defendants insist that the committee erred in receiving their written promise to abstain from any infringement of the plaintiffs' rights in or to their trade-mark. The objection is not well taken. The complaint is that the

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defendants have wilfully disregarded the plaintiffs' rights; it was the privilege of the latter to prove this allegation; and this written promise of the defendants bore directly upon the question of their good faith in the formation and use of their present device; and although this alone, of all items of evidence bearing upon that question introduced on one side and the other, is set forth in connection with the report of the committee, yet, inasmuch as the finding is that the defendants acted in good faith, we are unable to see that its presence works any injury to them. Indeed neither its presence nor its absence can at all affect the advice to be given to the Superior Court.

For the purpose of proving that the defendants' ounce packages of hair-pins so closely resembled those of the plaintiffs as to mislead an ordinary purchaser and consumer, the plaintiffs offered the testimony of several persons, who were or had been wholesale dealers in hair-pins in New York and Philadelphia, as experts. The committee received the evidence notwithstanding the defendants' objection. We see no error in this.

In *Gorham Company v. White*, 14 Wallace, 511, the testimony of die-sinkers, designers, editors of scientific publications, solicitors of patents, and dealers, was received upon the question whether ordinary purchasers would be misled by the similarity between two designs for forks and spoons. And in *In re Worthington Co.'s Trade-mark*, 14 L. R. Chan. Div., 8, brewers deposed that in their opinion a proposed trade-mark for ale would be calculated to deceive, "as the two marks might, and probably would, be exhibited together in houses where fermented liquors are sold." JESSEL, M. R., said:—"Now is such a trade-mark intended to deceive, or is it calculated to deceive? I have evidence before me to show that people would be deceived." In the first cited case especially, some of the testimony was from witnesses who are not shown to have ever been dealers in any manner in the articles concerning the appearance of which they expressed an opinion.

The question in the case before us is, does the defendants'

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trade-mark so closely resemble that of the plaintiffs' that it is liable to deceive purchasers; a matter which is to be determined by the eye, largely by the eye of the trier doubtless. And in view of these authorities we think it may properly be instructed by men who have looked at the packages in question with the interested and careful eye of a dealer.

The trade-mark for injury to which the plaintiffs complain is not theirs by creation, but by purchase, and one of them identifies it by stating the time and place of its origin and the mode of acquisition by themselves. He deposes, partly upon information and partly of knowledge, that it was established by Daniel Foot Tayler and Henry Shuttleworth of Gloucestershire, more than thirty-seven years since, and that it passed in 1848 from them to John Alfred Williams and Peter Eddleston and from these last to the plaintiffs. But the finding of the committee is as follows:—"When the firm composed of John Alfred Williams and Peter Eddleston was dissolved does not appear, nor how Peter Eddleston's interest was transferred to the present firm, if it ever was. Nor does it appear how the interest of Daniel Foot Tayler was transferred to the firm composed of John Alfred Williams and Peter Eddleston, if it ever was."

In the absence of proof of injury to the plaintiffs in the past and the finding being only that the ounce packages of the defendants "are liable to deceive purchasers," our advice to the Superior Court will concern the future only.

The Superior Court is advised to pass a decree restraining the defendants from such use of the name of "L. B. Taylor & Co.," in connection with any device upon pink or yellow wrappers inclosing hair-pins of their manufacture, as that the combination will be liable to lead purchasers to believe that hair-pins manufactured by the defendants were manufactured by the plaintiffs, when, upon a further hearing to be had for that purpose only by said court, the plaintiffs shall complete the proof of title in themselves to the device and trade-mark claimed in their complaint.

In this opinion PARK, C. J., and LOOMIS, J., concurred.

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CARPENTER, J., (dissenting.) I cannot concur in the result to which my brethren have come. The only ground for an injunction is to prevent the defendants from defrauding the plaintiffs. To justify an injunction it should be reasonably certain that the plaintiffs will be defrauded. There is no intention to defraud, for it is expressly found that the defendants acted in good faith. It is not found that the defendants, in a single instance, or others, have sold the defendants' goods as the plaintiffs'; and it is not reasonably certain that such will be the result in the future. The only part of the finding which indicates such a result is the following:—"The size and color of the labels or wrappers and the trade-mark or device printed thereon on the ounce packages used by the defendants as hereinbefore stated, resemble the plaintiffs' labels, wrappers and device thereon used on ounce packages as hereinbefore stated, to such a degree that they are liable to deceive careless and unwary purchasers who buy such goods hastily and with but little examination; but purchasers who read the entire trade-mark and label on the defendants' goods cannot be deceived or mistake the defendants' goods for the plaintiffs'."

It will be observed that the name "Taylor & Co.," as an essential or material feature of the case, is carefully excluded. Three things only are important—the device, and the size and color of the labels. The plaintiffs claim nothing from the device or trade-mark proper. Hence that may be laid out of the case. In respect to the size the finding is that "in general all hair-pin makers put up their goods in similar sized packages, wrapped around with a paper of the size and shape of exhibit No. 1,"—the plaintiffs' wrapper or label. As to color it is found that "pink and yellow papers of substantially the same shape and size and shade of the paper used by the plaintiffs in this case are used by other hair-pin manufacturers in putting up their goods for market." How, under this finding, the plaintiffs can have any right superior to that of the defendants, to the use of labels of the size, shape and color of those used by other manufacturers generally, is beyond my comprehension.

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But assuming, as I think a majority of the court must assume, that the imitation consists in the general arrangement and appearance of the labels, including of course the name as an important feature of it, still I contend that the plaintiffs have suffered and are in danger of suffering no legal damage. "Liable to deceive" purchasers. That is not equivalent to finding that they will be deceived, or that they will probably be deceived, or that the arrangement is calculated to deceive. And it certainly falls far short of showing that it is reasonably certain that they will be deceived. It indicates a possibility, but not necessarily a probability. A man is liable to be struck by lightning, but hardly one in a million ever experiences it. If that is objected to as an extreme case, take another illustration. Every man who travels by railroad or steamboat is liable to be injured by some accident, and yet hardly one in ten thousand is so injured. I use these illustrations for the purpose of showing that a liability ordinarily imports less than a probability.

It will be claimed however that the word as used in this finding is used in a different sense, or at least that it must be interpreted with reference to the subject matter to which it is applied. That I readily grant; and I concede all that I think can be reasonably claimed, that it shows that there is an even chance that some purchasers will be deceived. What if some few of the many millions of those who use hair-pins are led to purchase the defendants' goods supposing them to be the plaintiffs'? When we consider that it is only consumers that are liable to be deceived—for it is expressly found that dealers are not—and that each consumer purchases in small quantities, paying therefor a mere trifle, it is obvious that the loss of profits to the plaintiffs from that source will be very small and that it will require large numbers of persons to be thus misled before the loss will be appreciable. The finding fails to show that that will be the result. The loss of profits may and probably will be infinitesimal. Courts of equity do not grant injunctions for trifling matters. On the other hand the loss may be

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considerable ; but that is uncertain ; the court is called upon to act, not upon facts but upon conjecture. It seems to me much better that the plaintiffs should be required to wait until they can show positively that they will suffer material damage before asking for an injunction.

Again ; it is only the careless and unwary that are liable to be deceived. The consumer who knows the plaintiffs' goods and really desires to buy them will be vigilant and know what he buys. He cannot be deceived. The consumer who does not know them, or who has no particular preference for them, will be careless and unwary, or in other words indifferent. No manufacturer has a better right than others to the trade of that class. That is open to legitimate competition ; and when a customer is secured by one, so long as there is no fraud actual or constructive and no deception, there can be no injury in a legal sense to another.

I take it that this proposition cannot be controverted, that no injunction can properly issue unless the defendant represents or is about to represent in some manner or by some means that the goods which he makes and sells are the goods of another. When his purpose to do so clearly appears the case is free from difficulty and courts will protect the injured party in respect to all classes of purchasers. But when, as in this case, the resemblance is not designed, but is incidental, and results solely from the similarity of names in connection with the style and manner of preparing the goods for market, which style and manner are common to all manufacturers, the case is different, and courts ought to proceed with more caution. This distinction is an important one, and seems to me not to have been considered by the majority of the court. To cases of the former class the language of the courts as cited in the majority opinion may well apply. But it cannot be applied indiscriminately to cases of the latter class without danger of doing injustice. There is a rule however applicable to these cases which is well established. I quote from some of the authorities, both English and American :—

In *L. W. Thorley's Cattle Food Co. v. Massam*, 42 Law
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Times, (N. S.) 856, BAGGALLAY, L. J., says:—"Have the company, in offering for sale the article manufactured by them, made representations which were *calculated to induce a reasonable belief* on the part of those to whom the offers were made that the articles were manufactured by Joseph Thorley?" In *Leather Cloth Co. v. American Leather Cloth Co.*, 11 House of Lords Cas., 535, the Lord Chancellor says:—"All which can be done is to ascertain in every case as it occurs whether there is such a resemblance as to deceive a purchaser using ordinary caution." In *McLean v. Flemming*, 96 U. S. Reps., 245, CLIFFORD, J., says:—"Colorable imitations which require careful inspection to distinguish the spurious trade-mark from the genuine are sufficient to maintain the issue; but courts of equity will not interfere when ordinary attention by the purchaser would enable him at once to discriminate the one from the other. When the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser, in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right of redress if he has been guilty of no laches. What degree of resemblance is necessary to constitute an infringement is incapable of exact definition as applicable to all cases. All that courts of justice can do in that regard is, to say that no trader can adopt a trade-mark so resembling that of another trader, as that ordinary purchasers, buying with ordinary caution, are likely to be misled. When therefore a party has been in the habit of stamping his goods with a particular mark or brand, so that the purchasers of his goods having that mark or brand know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp; because, by doing so, he would be substantially representing the goods to be the manufacture of the person who first adopted the stamp, and so would or might be depriving him of the profits he might make by the sale of the goods which the purchaser intended to buy." This last remark is substantially in the language of Lord Chancellor CRANWORTH in *Seizo v. Provezende*, L. Reps., 1 Chancery Appeals, 196. "The court is not bound to

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interfere where ordinary attention will enable purchasers to discriminate between the trade-marks used by different parties." *Popham v. Cole*, 66 N. York, 76. If the trade-mark "would not probably deceive the ordinary mass of purchasers an injunction will not be granted." *Blackwell v. Wright*, 73 N. Car., 810. "All the authorities agree that the court will not restrain the defendant from the use of a label on the ground that it infringes the plaintiff's trade-mark, unless the form of the printed words, the words themselves, and the figures, lines and devices, are so similar that any person with such reasonable care as the public generally are capable of using and may be expected to exercise, would mistake the one for the other." *Gilmore v. Hunnewell*, 122 Mass., 189.

These quotations indicate to my mind the true rule. The imitation or resemblance must be of such a character as to amount to a representation that the goods which the defendants make are goods made by the plaintiffs. It necessarily follows that before there can be any legal injury the representation *must be believed by the purchaser*. The careful and vigilant purchaser examines and takes pains to know before he purchases; and if he purchases the defendants' goods for the plaintiffs', it is because he believes them to be such. On the other hand the careless and unwary purchaser takes little or no pains and purchases without any real belief on the subject. He may have a vague and indefinite notion, but it does not amount to a belief, so that it can be truly said of him that he has been misled.

This illustrates at once the distinction, and the reasonableness of the rule, for which I am contending. The careless and unwary purchases the goods made by one man, not because he believes they were made by another, but because he is so far indifferent that he takes no pains to ascertain. He has not been legally misled. The cautious man purchases them because he believes they were made by another. He has been misled.

Hence the propriety of the rule that the imitation must be calculated to deceive purchasers of ordinary caution.

For these reasons I think the injunction should not issue.

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SUPREME COURT OF ERRORS.

HELD AT NORWICH, FOR THE COUNTY OF
NEW LONDON,

ON THE THIRD TUESDAY OF OCTOBER, 1882.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, JS.

MOSES H. SISSON *vs.* CHARLES H. TUBBS.

The act of 1878 (Session Laws of 1878, ch. 129, sec. 2,) provides that upon a foreclosure the court shall, upon the motion of either party, appoint three appraisers, who shall, on the foreclosure taking effect, appraise and report to the court the value of the mortgaged property, which appraisal shall be conclusive upon the parties as to the value; and that in any later suit upon the mortgage debt the creditor shall recover only the difference between the value of the property as thus fixed, and the amount of his claim. Held that, under this statute, it was proper for the appraisers to report the whole value of the mortgaged property without reference to prior mortgages upon it, leaving the fact and amount of such prior incumbrances to be shown in any later suit upon the mortgage debt.

SUIT on a note which had been paid in part by the appropriation by foreclosure of certain mortgaged property; brought to the Court of Common Pleas, and tried to the court before *Mather, J.* Facts found and judgment for the defendant, and motion for a new trial by the plaintiff. The case is fully stated in the opinion.

S. Luce, in support of the motion.

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J. M. Thayer, with whom was *C. F. Thayer*, contra.

PARDEE, J. On May 1st, 1877, the plaintiff by purchase became the owner of a note made by the defendant for \$670, with interest, and secured by a second mortgage; on October 5th, 1878, he obtained a decree of foreclosure, the right to redeem limited to October 14th, 1878; his debt with costs amounting to \$683.22.

The act of 1878 (Session Laws of that year, p. 341, chap. 129, sec. 2,) provides that "upon the motion of any party to a foreclosure the court shall appoint three disinterested appraisers, who shall under oath appraise the mortgaged property within ten days after the time limited for redemption shall have expired, and shall make written report of their appraisal to the clerk of the court where said foreclosure was had, which report shall be a part of the files of such foreclosure suit, and such appraisal shall be final and conclusive as to the value of said mortgaged property; and the mortgage creditor, in any further suit or action upon the mortgage debt, note or obligation, shall recover only the difference between the value of the mortgaged property as fixed by such appraisal and the amount of his claim."

The defendant not redeeming, a committee duly appointed made an appraisement under oath and filed with the clerk the following report:—"We the undersigned, appraisers appointed by the Superior Court to appraise the property foreclosed in the case of *Moses H. Sisson v. Charles H. Tubbs*, having viewed the premises, do appraise the value to be \$1,800, free from all incumbrances." The plaintiff instituted this suit in the Court of Common Pleas for the recovery of that portion of his debt remaining unpaid after the application of the value of his mortgage security upon it. Upon the trial he asked leave to prove that on October 14th, 1878, a mortgage prior to his own was in life, securing a debt amounting to \$1,269.37; but the court excluded the evidence. He also asked leave to prove by evidence other than the certificate that the appraisers estimated the value

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of the land regardless of incumbrances; this was denied. He also asked leave to introduce evidence other than the certificate as to the value of the land on October 14th, 1878, regardless of incumbrances; this was denied. He also claimed that it was the duty of the appraisers to estimate the value of the land regardless of incumbrances; but the court determined that it was their duty to appraise the equity only, and that if they appraised the whole value relief could be obtained only by petition to the Superior Court. He also insisted that the appraisers had in fact determined the value to be \$1,800, less proven incumbrances; but the court determined that they had fixed the value of the land applicable to his debt at \$1,800, and that he was concluded thereby, and rendered judgment for the defendant. The plaintiff moved for a new trial.

The language of the statute is necessarily general; it is to be made applicable to cases in which the mortgage foreclosed is the first and only incumbrance, and to those in which it is the second or third; in either, the office of the appraisers' report is simply to establish, as between the debtor and creditor, an unchangeable standard of value by which to determine the question, whenever thereafter the creditor shall choose to raise it, whether the interest in land obtained by him by foreclosure equaled in value the debt due to him. A reported appraisement which enables a tribunal to determine that question without re-opening the question of value, satisfies the requirements of the statute.

Therefore, in the case before us, the appraisers' report which determines the entire value of the land without determining either the existence or extent of prior incumbrances is sufficient; and upon subsequent suit for any balance unpaid the creditor may prove the amount of prior incumbrances which he was compelled to remove; and the debtor may prove that there were none; and this question may be determined without re-opening the inquiry as to the value of the land.

There was error therefore in rejecting evidence offered by

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the plaintiff for the purpose of proving the existence of a prior incumbrance, and there must be a new trial.

In this opinion the other judges concurred.

* * *

THE NORWICH PRINTING COMPANY *vs.* HENRY C. KLOPPENBERG AND ANOTHER.

A plaintiff, after suit brought, can not assign the demand to his attorney, so as to defeat a legal right of set-off which the defendant had at the time the suit was commenced.

This right of set-off, originally given by Gen. Statutes, p. 434, sec. 13, is fully established by the 5th section of the Practice Act.

ACTION on a bond of recognizance, on which Henry C. Kloppenberg, one of the defendants, was principal and John M. Thayer, the other defendant, was surety. The suit was brought originally before a justice of the peace; the defendants pleaded in abatement, which plea the justice overruled and ordered the defendants to answer over. From this judgment Thayer appealed to the Court of Common Pleas, and Kloppenberg not appealing nor answering over, judgment was rendered against him. The following facts were found by the Court of Common Pleas, (*Mather, J.*)

On the first day of February, 1879, the plaintiff recovered a judgment before a justice of the peace against the defendant Kloppenberg, from which judgment he appealed to the Court of Common Pleas for New London County, and on that appeal the defendant Kloppenberg, as principal, and John M. Thayer, the other defendant in this suit, as surety, entered into a bond of recognizance to the plaintiff in the form prescribed by statute to prosecute the appeal to effect; and upon this bond the present suit is brought.

The appeal was duly entered by Kloppenberg in the Court of Common Pleas, and at the February term, 1880, it was defaulted and judgment rendered for the plaintiff to recover

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of Kloppenberg eight dollars and twenty-five cents damages, and twenty-seven dollars and sixty-four cents costs, and the judgment has never been satisfied in whole or in part.

William H. Jennings, Jr., was the attorney of the plaintiff in that suit, and the latter was indebted to him, as such attorney, for his fees and disbursements therein for the full amount recovered, of which he gave notice in writing to the defendants, on the 18th day of March, 1881, and of his claim for a lien on the judgment for the same.

On the 6th of January, 1882, this suit being pending, the liability of the defendants to the plaintiff on the bond of recognizance never having been satisfied or discharged, the plaintiff, in consideration of its indebtedness to Jennings for such services and disbursements, and to secure him for his fees and disbursements as attorney in the present suit, and in good faith, assigned to him the judgment against Kloppenberg, and the claim now in suit; and he gave notice of the assignment in writing the same day to the defendants, which assignment and notice were before any answer had been filed in this suit, and before Jennings had any knowledge of any claim on the part of Thayer of any indebtedness of the Norwich Printing Company to him. The indebtedness to Jennings remains unpaid, and he claims the demand in suit by reason of the lien and assignment.

Jennings was not a party to this suit at its commencement and has not been substituted or joined as a party since.

There was, at the commencement of the present suit, and at the time of the assignment, due from the Norwich Printing Company to Thayer, for professional services, a larger sum than the amount of its claim against him on the bond; of which he claimed, in his answer, to set-off against the claim of the plaintiff sufficient to satisfy the same, and asked judgment for the balance.

The defendant requested the court to rule that he was entitled to set off so much of his claim against the debt to the plaintiff as would be sufficient to satisfy it, and to recover a judgment against the plaintiff for the balance, and that the lien of Jennings, as attorney, upon the judgment

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against Kloppenberg and the assignment to him of that judgment and of the claim in suit, did not impair the defendant's right in this suit to the set-off claimed.

The court did not so rule, but found that the defendant was indebted to the plaintiff at the commencement of this suit in the sum of \$27.64, and ruled that Jennings had an attorney's lien thereon to the full amount thereof; that the same was legally assigned to him and that he was equitably entitled to the same; that by reason thereof the defendant was not entitled to the set-off claimed; and that the plaintiff was entitled to a judgment against the defendant for the sum of \$27.64, and rendered judgment accordingly.

The court rendered judgment for the plaintiff for this amount, and the defendant appealed to this court.

J. M. Thayer and C. F. Thayer, in support of the appeal.

1. Jennings, as attorney for the plaintiff in the original suit against Kloppenberg, had no lien upon the judgment rendered in that suit which could affect the rights of any third party; much less any claim upon the demand in this suit, as a security for that judgment, which could affect the rights of the defendant in this suit. *Rumrill v. Huntington*, 5 Day, 168; *Gager v. Watson*, 11 Conn., 168; *Andrews v. Morse*, 12 id., 444; *Benjamin v. Benjamin*, 17 id., 110.

2. By Gen. Statutes, p. 424, sec. 13, and the Practice Act, sec. 5, the defendant had a right to set off his debt against that of the plaintiff. The assignment of the plaintiff's debt pending the suit could not defeat that right. Had the assignee brought the suit in his own name under Gen. Statutes, p. 417, sec. 6, or had he, after the assignment, been substituted as plaintiff, as he might have been under the Practice Act, the defendant would have been allowed to set off this debt due from the assignor. Gen. Statutes, p. 424, sec. 14; Prac. Act, sec. 15; Rules, ch. 1, sec. 6.

3. This case is not within the rule established in *Rumrill v. Huntington*, 5 Day, 168, and adhered to in *Benjamin v. Benjamin*, 17 Conn., 110, and *Ripley v. Bull*, 19 id., 52. In each of those cases it was attempted to enforce in a court

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of equity an equitable right of set-off. The first case was decided before there was any statute of set-off. In the second the set-off was not claimed by virtue of, and clearly was not embraced in, the then-existing statute of set-off. In the third the plaintiff claimed to set off her debt by reason of the equities of the statute of set-off, and the court said "if by that statute the plaintiff could have availed herself of the right of set-off which she now seeks she had her remedy at law in that action, which would be a complete answer to the present bill in equity; and if she could not, it shows that the case was not embraced by the statute." In the present case the defendant has the right by statute to set off his debt.

4. The equitable doctrine of set-off, "that mutual debts should compensate each other by deducting the less from the greater, the difference being the only sum which can justly be due," has been incorporated into the law by our statute. But if one of the parties can, by bringing suit upon his claim and afterwards assigning it to his lawyer defeat the other party's right of set-off, the law is practically null.

S. Lucas, contra.

1. The court has found as a fact that Jennings had a lien on the judgment of the plaintiff against Kloppenberg, and that it and the claim in suit were assigned to him. His lien on that judgment must take precedence of the rights of the defendant Thayer in the present suit, as the lien accrued before the suit was brought; and the assignment of that judgment must be good against Thayer, as he had no right of set-off against the judgment, but only against the claim on the bond, which was a distinct and separate thing.

2. Jennings having an attorney's lien on that judgment and an assignment of it, he acquired thereby a lien on the bond in suit as security for its payment. Freeman on Judgments, sec. 431. If therefore the assignment of the judgment was good against Thayer, the bond also passed to Jennings as against Thayer.

3. In addition to this he had an assignment of the claim

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in suit itself on which he held such prior attorney's lien, to secure him for his fees and disbursements in the suit. This claim having been assigned in good faith to him, to secure him for his fees and disbursements, not only in the case in which judgment was rendered, but in the suit then pending, he acquired thereby a claim thereto that the defendant could not defeat by a set-off of any demand he had against the plaintiff. 1 Swift Rev. Dig., 547; *Rumrill v. Huntington*, 5 Day, 163; *Benjamin v. Benjamin*, 17 Conn., 110; *Ripley v. Bull*, 19 id., 52.

CARPENTER, J. It will relieve this case of some confusion and a possible misunderstanding of the real point in dispute if we bear in mind the distinction between this suit against Thayer and the former suit against Kloppenberg which is now ended in a judgment. The present suit is now prosecuted against Thayer alone; and against the demand now made on him he seeks to set off a claim which he has against the plaintiff. He claims no set-off or other defence in respect to the judgment against Kloppenberg. Nor will his claim, if allowed, affect that judgment or the assignment of it to Jennings, the plaintiff's counsel. That judgment and assignment will remain in full force whatever may be the disposition of this case. Nor is the subject matter of this suit identical with that. The most that can be said is, that this suit grows out of that; and if the demand against Thayer is collected, it will operate as a partial payment of that judgment. In that way Jennings, aside from the assignment to him of the demand in suit, may have an incidental interest in the question; but that circumstance in no wise affects the equities existing between Thayer and the plaintiff. If Jennings has any interest that will affect those equities it grows out of the assignment of the demand against Thayer, and not out of the assignment of the judgment against Kloppenberg. Therefore we may lay that judgment out of the case, and the question presented is simply this:—Can a plaintiff, after suit brought, assign the demand to his attorney and thereby defeat a legal right of

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set-off which the defendant had at the time the suit was commenced? The bare statement of the question ought to be a sufficient answer.

The plaintiff however claims that *Rumrill v. Huntington*, 5 Day, 163, *Benjamin v. Benjamin*, 17 Conn., 110, and *Ripley v. Bull*, 19 id., 53, virtually answer the question in the affirmative. *Rumrill v. Huntington* was this:—Rumrill recovered a judgment against Huntington; Huntington at the same time held three judgments against Rumrill. Rumrill assigned his judgment to Bradley, his attorney, of which Huntington had notice. Huntington afterwards brought a suit in equity against Rumrill for a set-off. The County Court decreed a set-off, and the judgment was reversed on a writ of error. The statute of set-off had not then been enacted and the court held that Bradley, being a creditor of Rumrill, was equal in equity with Huntington, another creditor, and, consequently, that the assignment to him was effectual to prevent the set-off. *Benjamin v. Benjamin* was similar in its facts and the principle involved was identical with that involved in *Rumrill v. Huntington*. A majority of the court, three judges against two, decided it in the same way, but admitted that it was an exception to the general rule, that an assignee of a non-negotiable chose in action takes it subject to equities existing between the original parties, and contrary to the general current of decisions elsewhere. *Ripley v. Bull* presented the same question upon similar facts, except that the debts were not evidenced by judgments. The court held that that circumstance did not distinguish the case from the others, and following those cases decided it in the same way.

These cases being, as they confessedly are, exceptions to a salutary rule of very general application, and contrary to the general current of authorities in other jurisdictions, liable as they certainly are to deprive suitors of a strong natural equity, should not be followed except in cases precisely analogous in fact and in principle. In other words the exception should not be extended.

Can this case then be reasonably distinguished from the

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cases referred to? We think it can in at least two material and important particulars.

In the first place, when this suit was commenced the defendant had a legal right by statute to set off his claim. The Practice Act (sec. 5,) provides as follows:—"In cases where the defendant has, either in law or in equity, or in both, a counter-claim, or right of set-off, against the plaintiff's demand, he may have the benefit of any such set-offs or counter-claims by pleading the same as such in his answer, and demanding judgment accordingly." This is broad and comprehensive language and was evidently designed to do away with all technicalities and enforce the equities between the parties in all cases. No such statute was in force when the decisions referred to were made. When the first case was decided there was no statute of set-off. Such a statute was in force when the second was decided, (Gen. Statutes, p. 424, sec. 18,) but does not seem to have attracted the attention of the court; and the third decided that the statute was not applicable to the facts of the case.

In the next place, the assignment in this case was not made until after the suit was brought. In all the cases referred to the assignment was prior to the bringing of a petition for a set-off. In matters of this kind the rights of the parties should be enforced as they existed at the commencement of the suit. When this suit was commenced Jennings had no claim on the demand against Thayer, and he could subsequently acquire none that would defeat the defendant's statutory right to plead his set-off or counter-claim in defence.

The Court of Common Pleas having decided otherwise, the judgment is erroneous and must be reversed.

In this opinion the other judges concurred.

Brown v. Congdon.

WILLIAM B. BROWN AND ANOTHER vs. JOSEPH B. CONGDON, EXECUTOR.

A complaint for a new trial will not be entertained where the ground on which it is sought is the misconduct of a juror, affecting the verdict, although not discovered by the party seeking a new trial until it was too late to file a motion in arrest of judgment. (Two judges dissenting.) A motion in arrest of judgment is the proper and only remedy in such a case.

WRIT OF ERROR from a judgment of the Superior Court dismissing a complaint praying for a new trial. The complaint was as follows:—

To the sheriff, &c. By authority of the state of Connecticut you are hereby commanded to summon Joseph B. Congdon, of New London, as he is the executor of the will of James Smith, late of New London, deceased, to appear before the Superior Court, to be held * * ; then and there to answer unto William B. Brown and Mary E. Goldobar, both of the city of Brooklyn, in the state of New York, in a civil action, wherein the plaintiffs complain and say:

First. The plaintiffs appealed to this court, at its March term, 1878, from the decree of the court of probate for the district of New London, approving of a certain instrument in writing purporting to be the last will and testament of said James Smith, deceased.

Second. Said appeal came on for trial to the jury at the September term, 1879, of this court, and a verdict was rendered sustaining the validity of said will and said decree of the court of probate approving of said will; which verdict was accepted by the court, and judgment rendered thereon at said term.

Third. During the trial of said cause to the jury, and while the case was under consideration, Jefferson Perkins, one of the jury impanelled in said cause, had a conversation with James S. Mitchell, of the town of Groton, regard-

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ing said cause. Said Mitchell made statements to said Perkins concerning the merits of the cause, derogatory to the claims of the plaintiffs made on the trial, and attempted to persuade him to render a verdict sustaining said will and the decree of said court of probate, and adverse to the plaintiffs.

Fourth. By reason of said conversation with said Mitchell, the said Perkins agreed to, and did, unite with the jury in rendering a verdict for the appellees in said cause; and except for said conversation no verdict would have been rendered in said cause in favor of said appellees.

Fifth. The plaintiffs had no knowledge of said facts until after the adjournment of said court.

Sixth. Said verdict and judgment against the plaintiffs, sustaining the validity of said will and said decree, are unjust.

The plaintiffs claim that said former verdict and judgment be set aside, and that they be allowed a new trial of said cause.

To this complaint the defendant demurred, and the court, (*Hovey, J.*.) sustained the demurrer and dismissed the complaint, on the ground that the court had no jurisdiction of the subject matter of the complaint.

D. Chadwick and S. Lucas, for the plaintiffs.

The Supreme Court may grant new trials of causes for mispleading, discovery of new evidence "or other reasonable cause." Gen. Statutes, p. 447, sec. 1; 1 Swift Dig., 815. The petition must be brought within three years after judgment is rendered. The only question in this case is, whether tampering with the jury, and thus obtaining a verdict, is a "reasonable cause," when the fact is not known until after the close of the term. The claim is made that there is no remedy except by motion in arrest filed within twenty-four hours after verdict. Gen. Statutes, p. 443, sec. 7; Practice Act, p. 3, sec. 6. And the case of *Stone v. Stevens*, 12 Conn., 282, is relied upon as conclusive that the Supreme Court has no power on a petition to grant a new trial for misconduct of

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the jury, whether the fact is known or not, except on motion made within twenty-four hours after verdict rendered. That case, however, does not authorize any such claim, the only question there discussed being as to the power of the court to fix by its rules of practice the time within which motions in arrest should be made.

The case before the court is not a *motion*, which under the rules must be filed within twenty-four hours. It is a *petition* for a new trial, either in equity or at law, according as the court may determine whether our rights are legal or equitable. Practice Act, p. 3, sec. 6.

We have a right to maintain this petition at law under Gen. Statutes, p. 447, sec. 1. The rule of practice as to motions is rigid, and if we attempt to take advantage of that mode, the motion must be filed within the specified time. But in cases where through no negligence it is impossible to take advantage of the remedy by motion, then the remedy by petition can be used.

The statute authorizing a motion for misconduct of the jury to be made, and which by application of the general rules must be made within twenty-four hours, does not in terms or in spirit exclude the right by petition. Nor does the statute authorizing a petition for a new trial exclude us. It is a broad and liberal act, intended by the legislature to embrace all cases where a reasonable cause is shown, leaving it to the discretion of the court to determine whether the facts show a reasonable cause. It would seem that if a new trial may be granted for mis-pleading, or for newly discovered evidence, it ought surely to be granted when a party has bought up a jury and thus obtained a verdict, and when the complainant had no knowledge of the fact until after the close of the term.

The petition is within the equity jurisdiction of the court. "Equity will interfere in all cases where by accident, mistake, fraud or otherwise, a party has an unfair advantage in proceeding in a court of law, which must necessarily make that court an instrument of injustice, and will also generally proceed to administer all the relief which the particular

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case requires." 2 Story Eq. Jur., § 885. "It may be stated as a general principle that any facts which prove it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident without fault or negligence on his part, will authorize a court of equity to interfere." *Id.*, § 887.

In *Jeffery v. Fitch*, 46 Conn., 601, the court entertained a bill in equity for a relief against a judgment although the three years had elapsed in which the petition could have been brought by the petitioner at law for a new trial on account of not having notice, on the ground that he had no knowledge of the judgment until after the three years had passed. The same principle should govern in this case, that is, if the party had no knowledge of the fraud until too late to file a motion in arrest, then he should be granted relief on petition. If not, and the Superior Court has no jurisdiction of the subject matter stated in the petition as held by the court below, then there is no remedy for a party thus defrauded.

A. C. Lippitt and *J. Halsey*, for the defendant.

This case was tried at the March term, 1879, and at the September term, 1880, a year and a half after, with a view to a new trial, the parties seek to set aside the verdict for misconduct, as it is claimed, on the part of a juror. It is not pretended that the opposing party had any connection whatever with the misconduct, if any such occurred.

1. For such a case the statute first enacted in 1821, provides a specific remedy. It is by motion to set aside the verdict. Gen. Statutes, p. 448, sec. 7. Such a motion is not, it is true, strictly speaking, a motion in arrest; for that is a motion based on matters appearing upon the record. Being a motion to set aside the verdict for matters *dehors* the record, it is said to be of an intermediate character; but in our practice it is known as a motion in arrest. *Hamilton v. Pease*, 38 Conn., 120; 1 Swift Dig., 802. The case

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before the court, therefore, though in form a *petition*, is, in fact, a motion in arrest.

2. A motion in arrest, under our statute and rules of practice, will not be entertained unless made within twenty-four hours after verdict rendered. Gen. Statutes, p. 448, sec. 5; id., p. 449, sec. 6; Rules of Prac., ch. 17, sec. 1, in 18 Conn., 576; Rules under Prac. Act, p. 261.

3. Though the statute passed in 1821 in terms gives to the court power to set aside verdicts for misconduct of jurors, yet it established no new principle. The power had been exercised before as a common law right; and not only exercised, but a time had been established within which the motion should be made. *Beach v. Hall's Admrs.*, Kirby, 235; *Sheldon v. Woodbridge*, 2 Root, 473; *Stone v. Stevens*, 12 Conn., 232; *Hamilton v. Pease*, 88 id., 115; *Tomlinson v. Town of Derby*, 41 id., 268. And although it is said in the last case that the court could exercise a discretion as to time, yet the court said (p. 271) "a party making a motion of this kind has but twenty-four hours in which to obtain his information and file his motion according to the rule." When the legislature embodied in a statute what had before been the common law, the practice of the court allowing no more than twenty-four hours within which to make the motion was not changed. This practice was known to the legislature, and the conclusion is irresistible that the power was affirmed to be exercised as it had been.

4. Notwithstanding these decisions and rules, the plaintiffs in this case claim that if the time has passed to make a motion to set aside the verdict it will be done if they ask for it in the form of a *petition*. That it may be done at any time within three years, they rely on the statute passed in 1762. Since the passage of that act, a period of nearly one hundred and twenty years, no one has ever before made the claim. All the cases to set aside a verdict have gone up on motion within forty-eight hours under the statute. The fact that no such claim has ever been made before, is a judgment of the whole profession, for more than a hundred years, that the right does not exist. If the principle is now

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adopted the flood-gates of litigation will be thrown open. No case tried to the jury can be considered settled till three years have gone by; not only on the ground of misconduct of a juror, but for any and all matters *dehors* the record.

5. Prior to the passage of the law of 1762 *petitions* for new trials were brought to and heard by the legislature, and motions to set aside verdicts, which in effect gave a new trial, were made to the Superior Court. The statute referred to in terms gave the Superior Court power, on the special grounds named, to grant new trials on petition, a power which it never exercised before. But the statute said nothing about new trials through a motion to set aside the verdict; for the power had been assumed and exercised by the court. That it might not be claimed that such power had been taken away by implication, the language was used—"other reasonable cause according to the usual rules in such cases." The right by petition is, therefore, excluded by statute and by practice. *Andersen v. The State*, 43 Conn., 516.

CARPENTER, J. The plaintiff in error brought a petition to the Superior Court for a new trial for the misconduct of a juror. The original cause was tried at the September term, 1879. The petition was brought in June following, returnable to the September term, 1880. The petition was demurred to, the Superior Court sustained the demurrer, and the petitioner has brought a writ of error to this court.

The statute authorizing the Superior Court to grant new trials, and under which the petition in this case was brought, is as follows:—"The Superior Court, Court of Common Pleas, District Court, and any City Court, may grant new trials of causes that may come before them respectively, for mispleading, the discovery of new evidence, want of actual notice of the suit to any defendant or of a reasonable opportunity to appear and defend when a just defence in whole or in part existed, or other reasonable cause, according to the usual rules in such cases." Gen. Statutes, p. 447, sec. 1. The question is whether the cause alleged is within the statute.

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The statute has been in force since 1762. Our reports show no precedent for a case like this, and, so far as we know, this is the first attempt to set aside a verdict on a petition brought for that purpose under that statute. That of itself is an argument of no inconsiderable force against this proceeding, especially as during all that time there was another well-established mode of setting aside verdicts for such causes.

We are told in *Stone v. Stevens*, 12 Conn., 219, that the practice of setting aside verdicts for that cause existed prior to the statute of 1821. In 1808 a case is reported in which a motion in arrest was filed for the misconduct of a juror and the verdict was set aside. *Bennett v. Howard*, 3 Day, 219. In *Stone v. Stevens*, on page 282, Judge HUNTINGTON says that the statute of 1821, providing that a verdict may be set aside for the misconduct of jurors, was "in affirmance of our common law"—that "it introduced no new rule." That such a practice did prevail cannot be doubted; that it grew up independently of and not under the statute of 1762 is equally clear.

The statute relating to jurors was first passed in 1821 and is now in force. It reads as follows:—"If any juror shall converse with any person concerning the cause, except his fellows, while it is under consideration, or shall voluntarily suffer any other person to converse with him, such verdict, on motion, may be set aside," &c. Here the statute expressly gives a remedy *on motion*, and not by an independent petition brought afterwards. It clearly contemplates a proceeding in the cause before final judgment. A remedy being given, other remedies are excluded.

Under this statute the practice is believed to have been uniform—to take advantage of such misconduct by a motion in error. It is sometimes called a motion to set aside the verdict, but in *Stone v. Stevens, supra*, it is considered as governed by the same rules and principles as motions in arrest of judgment, being essentially a motion in arrest for matters *dehors* the record. See also *Hamilton v. Pease*, 38 Conn., 115; *Tomlinson v. Derby*, 41 id., 268.

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In view of these facts—that this is the first attempt to apply the statute of 1762 to a case like this, that for nearly sixty years after that statute went into operation the courts adopted and enforced a common law remedy outside and independent of the statute, that in 1821 the legislature saw fit to sanction and affirm that practice, and that since that time the profession has regarded the practice as founded in law and reason—we ought certainly to hesitate to disturb it by introducing a new rule of practice. Such a practical construction of the two statutes, continued for so long a time, ought to be regarded as very high evidence of what the law actually is. Indeed such a state of things ought not to be disturbed except by the legislature.

We regard the practical construction of the statute of 1762 as the correct one. New trials may be granted for mispleading, newly discovered evidence, want of notice, or a reasonable opportunity to appear and defend when a good defence exists, "or other reasonable cause." Several causes are enumerated, and then follows the general clause, which, according to a familiar rule of construction, was intended to embrace other causes only of the same general character. The causes enumerated result from mistakes or accidents, and show that the party has been deprived of some right or privilege that the law intended he should have. They relate to the merits of the case and indicate a probable failure of justice.

The case before us is of a different character. The cause does not necessarily have any reference to the real merits; it is simply the misconduct of one of the triers. It may or may not implicate the successful party; and if it does, the merits of the case, notwithstanding, may be with him. If he is not implicated, then the misconduct is entirely divorced from the merits. But a more important distinction is, that the enumerated causes embrace a class of cases not covered by any other statute, and the design manifestly was to provide a remedy where none previously existed except by legislative action. We think that the general clause should be limited to that class of cases, and not

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construed as embracing cases provided for by other statutes; and that the attempt to bring cases provided for by one statute within the operation of another, under general words of this description, ought not to succeed.

In principle, so far as the remedy is concerned, there is a strong analogy between the misconduct of jurors and the errors of the court in ruling upon questions of evidence and in charging the jury. The remedy which the statute provides in the one case is a motion in arrest; in the other it is a motion for a new trial, or, under the present practice, an appeal. In *Andersen v. The State*, 43 Conn., 514, we held that the Superior Court has no power, upon a petition for a new trial, to grant a new trial for error in the charge of the court. That case establishes the principle that the special statutory remedy must be resorted to, and seems to be an authority for this case but for the circumstance alleged that the plaintiff did not know of the misconduct in season to take advantage of it by a motion in arrest. But that circumstance can have little or no weight in construing the statute. If the terms of the act are broad enough to apply to unknown misconduct, they must be equally applicable to misconduct which is known.

Ignorance of the fact might address itself to the discretion of the court if the court had jurisdiction, but is hardly a sufficient reason for conferring jurisdiction in a case where the court would not otherwise have it. At first sight it seems plausible that a party should not be deprived of his remedy in a case where the facts come to his knowledge too late to avail himself of the ordinary remedy when he is without fault, and if no one was to be affected by allowing the remedy but the immediate parties to the suit the case would present a somewhat different aspect. But this case, like all others, must be governed by general rules and principles. Those rules and principles have for their ultimate object the public good. It is far better that occasional hardships should be endured than that general rules should be dispensed with.

The rule that a motion in arrest must be filed within

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twenty-four hours after verdict is in its nature like the statute of limitations. All such statutes occasion now and then hardships to individuals, but they are nevertheless of great importance to the public and probably prevent more hardship and injustice than they occasion.

The fact that a party is ignorant of facts touching his rights until after his claim is barred by the statute does not exempt him from its operation.

So here the limitation, although the time is short, is found by experience to be on the whole for the interest of the public. We no more feel at liberty to disregard it on account of the hardship of a particular case than we do to disregard an ordinary statute of limitations for a similar reason.

It is possible under most legal rules for parties in some instances to suffer injustice. It is believed however that the rule under consideration has very rarely produced that result. Hitherto the cases do not seem to have been sufficiently numerous to attract the attention of the legislature, and it is doubtful whether any different rule can be devised which will be more satisfactory than the present one.

There is no error in the judgment complained of.

In this opinion PARK, C. J., and PARDEE, J., concurred.

LOOMIS, J., (dissenting.) While conceding that there is great force in the reasoning that supports the majority opinion, I feel nevertheless constrained to dissent. It seems to me a reproach to the law if it affords no remedy for the flagrant injustice which the case discloses. The demurrer to the petition for a new trial admits all the facts alleged as fully for the purposes of the present inquiry as if found by the court after hearing all the evidence.

The facts then are as follows. (I quote from the record:) —“During the trial of said cause to the jury, and while the case was under consideration, Jefferson Perkins, one of the jury who was impaneled in said cause, had a conversation with James S. Mitchell, of the town of Groton, regarding

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said cause. Said Mitchell made statements to said Perkins concerning the merits of the cause, derogatory to the claims of the plaintiffs made on the trial, and attempted to persuade him to render a verdict sustaining said will and the decree of said court of probate, and adverse to the plaintiffs. By reason of said conversation with said Mitchell, the said Perkins agreed to, and did, unite with the jury in rendering a verdict for the appellees in said cause; and except for said conversation no verdict would have been rendered in said cause in favor of said appellees. The plaintiffs had no knowledge of said facts until after the adjournment of said court."

Now if these facts do not constitute "a reasonable cause" within the meaning of the statute concerning new trials, it is difficult to conceive any such cause. But it is said that these words must be construed as importing some other cause of a similar general character. Granting this position for purposes of argument, we think it is brought within the principle and reason of the causes specified.

The principle is that a party should have his day in court, with a full and fair opportunity to present his own side of the case and meet that of his adversary. It is said the petitioner had his day in court before the jury; but of what avail, when a day *out* of court in behalf of the other party nullified it all, and rendered the trial utterly useless.

If Mitchell's statements had been permitted in court and before the entire jury when the petitioner was not present or notified to be, it would have furnished clear ground for a new trial. Is the ground less reasonable because the statement was made when there was no court to restrain the party, no oath to lend its solemn sanction, and no one to answer it?

But again, it is said that the cause relied upon for a new trial is one not affecting the merits. It is difficult to see what can more vitally affect the merits than that which subverts the very foundations of a fair judicial trial, nullifies the effect of all legitimate evidence, and renders the merits of no account as influencing the result.

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It is not enough to say that the verdict may have been right. The same might be said of a verdict obtained by bribery.

It should be borne in mind that this is not a case of mere bias or suspicion of bias on the part of a juror, but the illegitimate influence here was successful; it actually produced the verdict. It not only accomplished what the evidence before the court could not do, but it overcame all the evidence on the other side and rendered it of no account. The record is explicit, that by reason of the conversation the juror united in rendering the verdict, and that except for the conversation no verdict in favor of the appellees would have been rendered.

The ground therefore upon which this petition rests is not merely that there was a mis-trial, but that there was no trial at all in contemplation of the law. This distinction is forcibly stated by PEARSON, J., in *State v. Tighman*, 11 Ired., 513, on page 553. "When there are circumstances which cast suspicion upon the verdict by showing that there might have been undue or improper influences exerted on the jury, it is in the discretion of the presiding judge to grant a new trial, but if the fact be that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or the prisoner, or if they be solicited and advised how their verdict should be, or if they have other evidence than that which was offered on the trial, in all such cases there has been in contemplation of law no trial; and this court will direct a trial to be had." See also Hilliard on New Trials, 2d ed., p. 211, § 12.

In this view of the case, were there technical difficulties in applying the statutory remedy, it would seem that a court of equity might relieve against a judgment so obtained and grant a new trial on the ground that it was virtually the same as having no opportunity in court to defend. 2 Swift's Dig., 138; *Jeffery v. Fitch*, 46 Conn., 601.

But I think the expression, "other reasonable cause," may well refer to causes which at the time the statute was passed and long before had been so universally recognized

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as good ground for a new trial. In 2 Tidd's Practice, p. 817, misconduct of a jury is mentioned among the most prominent grounds for a new trial. It is so in Hilliard on New Trials; see 2d ed., pages 198 to 252. Also in Hirsh on Juries, § 577 to § 626.

And in all the treatises on the subject a distinction is made between new trials for grounds *dehors* the record and arrest of judgment for causes appearing on the record. In *Quinebaug Bank v. Leavens*, 18 Conn., 88, CHURCH, C. J., in giving the opinion, says:—"Motions in arrest of judgment in this state for causes not apparent on the record, are in truth only applications for new trials, and are so called and so treated elsewhere;" and the principles that govern new trials were applied to a motion in arrest in that case.

But I am reminded that though the ground referred to might have been appropriate for a new trial, yet in this state another more simple and speedy remedy by motion in arrest has been adopted, first by the courts, and then by the statute of 1821 relative to jurors.

If this remedy must be considered as exclusive it ends our argument. As to parties having knowledge and opportunity I concede that it is the only remedy, but I cannot think that it was ever intended to embrace those who had no knowledge or means of knowledge of the facts relied upon. The very brief time prescribed for action, namely, twenty-four hours, renders this construction most probable. As to those having knowledge it is a wise policy of the law to require such speedy (almost immediate) action, but as to others, who could by no possibility avail themselves of it, it is extremely unjust, and affords a most reasonable cause for the other remedy provided by the statute relating to new trials. This construction too accords best with the analogies of the law; for instance, it is a general rule that an application for a new trial cannot be made after a motion in arrest has been overruled, but this rule is applied only where the party has knowledge of the fact on which he grounds his motion for a new trial at the time of moving in arrest. *Mason v. Palmerton*, 2 Carter, 117; *McKinney v. Springer*,

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6 Ind., 453. In *Knifong v. Hendricks*, 2 Gratt., 212, it is held that if a party had no opportunity to move for a new trial in the court where the verdict was rendered, equity will grant a new trial.

As to the argument founded on the fact that an independent application for a new trial for a cause like this has never before appeared in our courts, so far as we know, I must admit it has much force. It is however by no means conclusive, for we do not know that there has ever been any occasion for it. True, if this is so, it is quite surprising; but all persons familiar with the courts know that we are frequently surprised with questions made for the first time, which if we consider their nature we should say must have been often made before. Although there are no precedents from our decisions precisely in point, yet several cases may be cited where, in cases for misconduct of jurors, a motion for a new trial was resorted to instead of a motion in arrest.

In *State v. Andrews*, 29 Conn., 100, a motion for a new trial was made and entertained by the Supreme Court, though there had been a previous motion in arrest for the same cause. The cause was that a juror not on the panel made confidential remarks about the case to a juror on the panel, which the latter entertained and discussed. A new trial was advised by this court.

In *Smith and others v. Merriman*, heard and determined by this court for the First Judicial District, May term, 1878, (not reported, but the opinion by GRANGER, J., was filed with the clerk of the Superior Court,) a motion for a new trial was made for the reason that a certain writing not admitted in evidence was by inadvertence allowed to go to the jury with the other papers, and a new trial for that reason was advised.

In *Donlin and wife v. City of Bridgeport*, heard by this court for Fairfield County at the October term, 1881, the opinion by PARK, C. J., being filed with the clerk, a motion for a new trial was made by the defendant on the ground that one of the jurors who united in a verdict for the plaintiff was interested in the precise question at issue. The

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action was for a personal injury received by the plaintiff, Mrs. Donlin, by reason of a defective highway, while riding and using the horse, wagon and harness of the juror, which were also injured at the same time from the same cause. The majority of the court denied a new trial on the merits under the peculiar circumstances of the case, but not because the remedy was mistaken.

Now as to these cases it should be stated that there was no objection to the remedy and no discussion on that subject. I think the party making the motion in each of them had knowledge of the facts, so that he might have moved in arrest, and in strictness the latter was the true remedy.

My object in citing the cases is simply to show that the motion in arrest has not been universally regarded by the profession, nor by the court, as the only remedy in case of misconduct of a juror.

I think there was error in the judgment complained of.

In this opinion GRANGER, J., concurred.

Hawes's Appeal from Probate.

SUPREME COURT OF ERRORS.

HELD AT BRIDGEPORT FOR THE COUNTY OF
FAIRFIELD,

ON THE FOURTH TUESDAY OF OCTOBER, 1882.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, JS.

EDMUND V. HAWES'S APPEAL FROM PROBATE.

The fifth section of the insolvent act (Gen. Statutes, p. 879,) provides that "when a writ of attachment shall have been issued upon a claim founded on contract of one hundred dollars or more, upon which writ shall have been indorsed the affidavit of the plaintiff or his attorney that he believes such claim to be justly due, if the officer serving the same, after making demand of all such debtors as are found within his precincts, cannot find sufficient property to satisfy such attachment,

* * * the plaintiff may petition the court of probate for the appointment of a trustee to take possession of the property of such defendant for the benefit of his creditors." Held that the officer serving the writ was bound to attach real estate, if he could find sufficient to satisfy the claim.

Also that it made no difference that the real estate was incumbered, so long as the equity of redemption was of sufficient value.

TWO APPEALS from probate to the Superior Court, heard before *Hitchcock, J.* Appeals dismissed and motions in error by the appellant. The facts are sufficiently stated in the opinion.

A. S. Treat and *H. S. Sanford*, for the plaintiff in error.

Hawes's Appeal from Probate.

A. B. Beers and G. Stoddard, for the defendant in error.

PARK, C. J. There are in this case two appeals from decrees of the court of probate between the same parties, but both rest on a single question, and we will treat the two as a single case.

The 5th section of the insolvent act provides that "when a writ of attachment shall have been issued upon a claim, founded on contract, of one hundred dollars or more, upon which writ shall have been indorsed the affidavit of the plaintiff or his attorney that he believes such claim to be justly due, if the officer serving the same, after making demand of all such debtors as are found within his precincts, cannot find sufficient property to satisfy said attachment, and shall have made a sworn return upon such writ to that effect, the plaintiff may petition the court of probate for the appointment of a trustee to take possession of the property of such defendant for the benefit of his creditors."

The appellees, Hannah and Arabella Hoag, held a claim against the appellant, Hawes, of \$2,200, and procured a writ of attachment against him, directing in the usual form the attachment of his "goods or estate," to the amount of thirty-five hundred dollars. Upon the writ was indorsed the oath of the plaintiff's attorney that he believed the claim to be justly due, and the officer who took it for service made a sworn return that he had made demand upon the defendant for goods or estate on which to levy the attachment, but that he neglected and refused to expose any, and that he then made search throughout his precincts and could not find sufficient property of the defendant to satisfy the attachment. The plaintiffs in the suit thereupon petitioned the probate court of the district within which Hawes resided for the appointment of a trustee of his estate as an insolvent estate; which appointment was made by the court. The principal appeal in the case is from the decree making the appointment.

It is found that Hawes in fact, at the time of the demand, disclosed to the officer about two hundred dollars worth of

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personal property, and his residence, which is found to have been at the time worth \$15,000, but incumbered by a mortgage of \$10,000, and that Hawes in fact owned the property, but that the officer did not consider it his duty to attach this property and did not attach it.

Upon these facts the question is, whether the case was one for the appointment of a trustee upon the petition of the creditors who had brought the attachment suit.

It is clear that it is not enough that the officer made a sworn return that he could not find property. This return is not to be taken as conclusive evidence that none could be found. The language of the statute is, "if the officer *can not find* sufficient property * * and shall have made a sworn return upon such writ to that effect." The real fact as to the existence of sufficient property may be shown, in spite of the return. Besides which, it appears that the debtor did disclose to the officer the property which it is found that he owned.

The only question therefore is, whether that property was sufficient to satisfy the attachment within the meaning of the statute. We may lay out of the case the \$200 of personal property as obviously insufficient. Was it the duty of the officer to attach the land? It is a general rule in ordinary cases of attachment that an officer is not bound to attach real estate. The appellee claims that the same rule applies here. It is also claimed that if the officer was bound to attach real estate yet he was not bound to take an equity of redemption. We will consider both these questions.

In the first place, with regard to the attachment of real estate. There may be a difficulty, taking this part of the statute by itself, in showing any reason for a distinction between a suit brought as preliminary to insolvent proceedings and an ordinary suit commenced by attachment. The object of an ordinary attachment is the collection of the debt; and by our statute, under which land levied upon is set off to the debtor, the debt is merely satisfied in law, but not in fact collected. The law therefore does not require the officer to make such a levy, nor to attach land in the

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first instance. Here it may be said that the creditor is in the same way seeking to collect his debt; but the fact is not to be overlooked that the attachment is made, not with the real expectation of collecting the debt, but as a preliminary to proceedings in insolvency. The case therefore which the creditor is making up, for presentation to the court of probate, is that of the debtor's insolvency. But a debtor is not insolvent if he has real estate sufficient to satisfy his indebtedness. If it were not so a debtor might owe \$5,000 and have \$100,000 of real estate, and yet be insolvent. This of course can not be so.

But light is thrown upon this part of the statute by the latter part of the same section. The statute there provides that the court of probate, upon the petition of the creditor who has taken the steps we have been considering, shall upon the hearing, "if such petition shall be found true, and said debtor shall fail to satisfy *or secure said claim in such manner as said court shall deem sufficient*, appoint a trustee," &c. Here unquestionably the court may approve a securing of the claim by real estate. It would be strange, if the proceedings could be arrested by the giving of such security, that an attachment of the same land would not have been enough in the first place. We must therefore conclude that it was the duty of the officer to attach real estate if he could find enough to satisfy the claim.

And this brings us to the second question, whether the officer was bound to attach an equity of redemption. We think that the mere fact that the real estate was mortgaged is not of itself sufficient to excuse the officer from taking it. Of course the value of the equity is to be considered in determining whether it is sufficient to satisfy the claim. But supposing it to be sufficient, we think the statute intends to place it on the same ground with real estate that is not encumbered. The property may be worth ten times the amount for which it is mortgaged. It is clear that the debtor might offer to secure the debt in court by a mortgage of the equity, and that the court would have the right to decide upon the sufficiency of the security. This necessa-

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rily follows from the provision of the statute that the claim is to be secured simply "in such manner as the court shall deem sufficient." In any doubtful case it is for the court to determine the point.

We think there is error in the judgment of the Superior Court dismissing the appeals.

In this opinion the other judges concurred; except LOOMIS, J., who dissented.

CHARLES LA CROIX vs. THE COUNTY COMMISSIONERS OF FAIRFIELD COUNTY.

The act of 1881, which gives to the county commissioners in each county sole and final jurisdiction of the granting and revoking of licenses for the sale of intoxicating liquors in the county, does not constitute them a court within the meaning of the constitution of the state.

It is therefore no objection to the act that it does not provide for a trial by jury of the question whether a licensee has violated the law or for an appeal from a revocation of his license by the commissioners on the ground of such violation.

The county commissioners, being only a board and not a court, a writ of prohibition can not be issued against them by the Superior Court, for such a writ, in the absence of a statute authorizing it, lies only against an inferior judicial tribunal.

Licenses granted for the sale of intoxicating liquors, upon fees paid therefor, are not a contract between the state and the persons licensed, and are not property in any constitutional sense.

They form a part of the internal police system of the state, are granted in the exercise of the police power of the state, and may at any time be revoked by legislative authority.

The commissioners could take cognizance of an application for the revocation of a license on the ground of a violation of law by the licensee, while a criminal prosecution was pending against the licensee for the same violation of the law.

To abate a new suit on the ground of the pendency of another, both must be of the same character, between the same parties, and brought for the same purpose.

APPLICATION for a writ of prohibition; brought to the Superior Court and heard before *Hovey, J.* Application

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dismissed, and motion in error by plaintiff. The case is fully stated in the opinion.

D. B. Lockwood and J. B. Hurlbutt, for the plaintiff.

J. H. Perry and F. L. Holt, for defendants.

LOOMIS, J. The complainant, a licensed liquor seller, was convicted before a justice of the peace of keeping open his liquor saloon in Westport on Sunday, and appealed his case to the Superior Court. Pending the appeal, Perry, one of the defendants, as prosecuting agent, cited him to appear before the county commissioners, under chapter 124, of the session laws of 1881, p. 74, to show cause why his license should not be revoked for the violation of law above mentioned.

He appeared before the commissioners and pleaded in abatement the pendency of the criminal prosecution in the Superior Court. This plea was overruled, and the commissioners proceeded against his objection to determine by evidence whether he had violated the law as alleged, for the sole purpose of determining whether or not to revoke his license. Thereupon the complainant obtained from the Superior Court a rule to show cause why a writ of prohibition should not issue against the commissioners upon the ground that they exceeded their jurisdiction in proceeding to consider the question whether or not his license should be revoked. The Superior Court, having heard the parties, discharged the rule to show cause and dismissed the application; and the complainant brings the record before this court by motion in error.

The statute under which the proceedings complained of were had is as follows:—

“SEC. 1. The county commissioners of each county, while in session for the purpose, shall constitute a court for the trial of causes for the revocation of licenses for the sale of intoxicating liquors granted in the county; and shall have sole and final jurisdiction of such causes. All licenses

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hereafter issued shall be revocable, in terms, for any violation of the laws regulating the manufacture or sale of intoxicating liquors.

“SEC. 2. While so in session at their respective place or places of meeting in the county, the chairman of the board shall have all the powers of justices of the peace holding court in their respective towns, to compel the attendance and secure the testimony of witnesses duly summoned before them. Said commissioners shall receive for such services the same fees and expenses as in other service for the county, and if they find it necessary to be in session, for the purposes provided in this act, any days in excess of the number limited by law, they may charge the usual *per diem* compensation for such excess, notwithstanding such limitation.

“SEC. 3. Accused persons shall be cited to appear before the commissioners by complaint of any informing officer setting forth the offences charged, accompanied by a summons signed by competent authority, citing the accused to appear, if he see cause, before the commissioners at their place of meeting, on a given day and hour, to show reasons, if any he has, why his license should not be revoked; such process to be served by copy thereof, left with the accused or at his usual place of abode, at least six days before the day the same is made returnable, by a proper officer.

“SEC. 4. The fees of the officer serving the process, and of the witnesses summoned, shall be the same as in criminal causes; and the fees of the informing officer shall also be the same as in criminal causes, provided that in the opinion of the commissioners the prosecution was brought in good faith and upon probable cause. And the fees authorized in this section shall be taxed by the chairman of the commissioners, and reported by him in writing to the county treasurer for record in a book provided for the purpose; and the chairman shall, on his order, draw from the treasurer the gross amount so taxed in each cause, and pay out the same to the persons to whom taxed; provided, however, that in no event shall the total amount of costs taxed against the

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county treasury in any one case exceed the sum of fifty dollars, and the fees of the commissioners, prosecuting agents, witnesses and officers shall, if necessary, be scaled *pro rata* to such sums as shall make the aggregate not more than fifty dollars.

“SEC. 5. On the revocation of the license by the court of commissioners, the bond given by such person to the county when so licensed shall be put in suit by the treasurer of the county, and prosecuted in his name to final judgment, for the benefit of the county, unless the county commissioners, for good reason, direct otherwise; and the reasonable expenses of such prosecution, audited by the chairman of the commissioners, shall be paid out of the county treasury.”

It is to be observed that the errors as assigned do not in terms involve the validity of the above statute; they do however in reality and of necessity, for if the statute is constitutional it virtually furnishes its own answer to every objection on the part of the complainant.

1. Passing by the general assignment, the first error is that the court mistook the law in holding that the board of county commissioners was a court under the laws and constitution of this state. This assignment we think is subject to the criticism that it nowhere appears from the record that the court so held, and if left to mere inference we would say it held the contrary. Moreover, the assignment of this as a ground of error implies that the complainant's contention in the court below was that the commissioners did not constitute a court. If this was true there would be no basis for a writ of prohibition, for such a writ lies only against an inferior judicial tribunal, unless specially authorized by some statute. 1 Swift's Digest, 565; High on Extraordinary Remedies, sec. 784.

But waiving all criticisms and technicality we will endeavor to meet what we suppose to be the complainant's real objection under this head, namely, that the statute purports to create a court in the usual legal acceptance of the term; and that, if so construed, the law must be held unconstitutional, because the county commissioners in that event

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must be considered judges, and as such they are elected for three years, contrary to the third section of the fifth article of the constitution of this state, which provides that judges of the inferior courts must be appointed annually; and also because the statute fails to provide for a jury trial or an appeal.

But is the complainant's construction of the statute correct? On this subject we accept the views of the learned judge who presided in the court below, that although the word "court" is used in the first and last sections of the act in question, yet the legislature did not thereby intend to create an inferior court in the constitutional sense, but rather a tribunal for the sole purpose of considering questions relative to the revocation of licenses to sell liquor. The commissioners who are to decide the question are not called judges anywhere in our statute, but are called a board in the second section, having a chairman, and not a presiding judge. In this capacity they grant licenses, and in the same capacity they revoke them; only in the latter case the law, considering that the licensees have paid money and made investments on the strength of the license, gives greater formality to the proceedings in order to guard against injustice.

Again, if the intention was to create a court, the second section conferring special power on the chairman of the board "to compel the attendance and secure the testimony of witnesses duly summoned before them," would have been omitted, being entirely unnecessary, for as to all courts the statute had already made ample provision for this purpose. General Statutes, p. 61, sec. 17.

2. The next alleged error was "in holding that the county commissioners could take cognizance of and hear and determine the matter pending before them when a criminal prosecution for the same cause had been commenced before the complaint to them and was then pending in the Superior Court having cognizance of the matter."

The question here raised is the same as that which was presented by the plea in abatement before the county commissioners. We think the plea was properly overruled.

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To furnish ground for a plea in abatement on account of the pendency of a prior suit, it is indispensable that both suits be of the same character, between the same parties, and brought to obtain the same end or object. In other words, it must appear that the second suit is oppressive and vexatious because there is no necessity for it. *Hatch v. Spofford*, 22 Conn., 485. If therefore the criminal case in the Superior Court and the proceedings before the commissioners to revoke the complainant's license can both be regarded as suits pending in different courts, there would still be wanting every recognized ground of a good plea in abatement for the cause mentioned. The parties are not the same, and the character of the suits and the ends to be accomplished by them are as unlike as it would be possible to conceive. And if we apply the test that the second suit must be found vexatious because unnecessary, we find the second suit here indispensable. There is no other tribunal besides the county commissioners that can revoke the license. And the fact that the statute in question (if constitutional) gives the commissioners sole and final jurisdiction of this matter, is of itself a perfect answer to this part of the complainant's motion in error.

3. The other assignment of error is "that the court erred in holding that the county commissioners had authority to try and determine by evidence as to whether the complainant had violated the law, and in holding that they did not exceed their jurisdiction in holding plea of said matter."

At the time the complainant's license was granted not only was the law in force which we have already cited, directing the proceedings for the revocation of such licenses, but the General Statutes, p. 268, sec. 2, directed the county commissioners to revoke licenses for breaches of the liquor laws, and the act of 1881 (Session Laws of 1881, ch. 60, sec. 2,) provided that any violation of the law should, *ipso facto*, work a forfeiture of the wrongdoer's license.

It would seem therefore that the statutory authority was most ample to cover and justify the proceedings in question. So that if there is any basis at all for the error assigned it

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must be found in some constitutional provision which nullifies the legislative provisions referred to.

Among the most prominent objections of this character may be mentioned the absence of any provision for a trial by jury. But our constitution secures the right of trial by jury in only two classes of cases, namely, in all prosecutions by indictment or information, (art. 1, sec. 9,) and in cases where the right existed before, (art. 1, sec. 21). *Guile v. Brown*, 38 Conn., 237.

And in other states, under constitutions guaranteeing the right of trial by jury, it has always been held not to mean to secure that right in all possible instances, but only in those cases which existed when the constitution was formed; and it is everywhere conceded that the legislature may create new offences by statute and make them triable by summary proceedings without a jury. Sedgwick on Statutory & Constitutional Law, (ed. of 1857,) p. 548; *Van Swartow v. The Commonwealth*, 24 Penn. St., 181; *Boring v. Williams*, 17 Ala., 510; *Harris v. Wood*, 6 Monroe, 642; *In re Powers*, 25 Verm., 261; *Murphy v. The People*, 2 Cow., 815; *Shirley v. Lunenburgh*, 11 Mass., 385; *Backus v. Lebanon*, 11 N. Hamp., 19; *Supervisors of Dane County v. Dunning*, 20 Wis., 210; *Commissioners v. Seabrook*, 2 Strob. Law., 560; *Tabor v. Cook*, 15 Mich., 322; *R. R. Co. v. Heath*, 9 Ind., 558; *State v. Peterson*, 41 Verm., 504; *R. R. Co. v. Ferris*, 26 Tex., 588; *Sands v. Kimbark*, 27 N. York, 147; *Howe v. Plainfield*, 37 N. Jer., 145; *Commissioners v. Morrison*, 22 Minn., 178.

Neither is the validity of the statute affected by the absence of any provision for an appeal. In *Ex parte Detroit River Ferry Co.*, 104 U. S. R., 519, WAITE, C. J., in giving the opinion, said:—"It is no ground for relief by prohibition that provision has not been made for a review of the decision of the court of original jurisdiction by appeal or otherwise. A prohibition cannot be made to perform the office of a proceeding for the correction of mere errors and irregularities. If there is jurisdiction, and no provision for appeal or writ of error, the judgment of the trial court is

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the judgment of the court of last resort and concludes the parties. It rests with Congress to decide whether a case shall be reviewed or not."

But it is further said that the act in question is invalid, because in authorizing proceedings for the revocation of licenses it impairs the obligation of contracts, and takes away property rights without compensation or due process of law. It should be borne in mind at the outset that the complainant's license was revocable in its very terms, as required by the statute, and therefore nothing was proposed to be done in the way of its revocation except in strict accordance with its own terms. But aside from this consideration, if anything can be settled by legal authorities, the doctrine is too well established to be longer called in question, that a license of this character, whether revocable in terms or not, is neither a contract nor property in any constitutional sense, but is subject at all times to the police powers of the state government. In the language of WRIGHT, J., in giving the opinion of the court in *Board of Excise v. Barrie*, 34 N. York, 667, "these licenses to sell liquors are not contracts between the state and the persons licensed, giving the latter vested rights, protected on general principles and by the constitution of the United States against any subsequent legislation; nor are they property in any legal or constitutional sense. They have neither the qualities of a contract nor of property, but are merely temporary permits to do what otherwise would be an offence against the general law. They form a portion of the internal police system of the state, and are issued in the exercise of its police powers, and are subject to the direction of the state government, which may modify, revoke or continue them as it may deem fit. If the act of 1857 had declared that licenses under it should be irrevocable (which it does not, but by its very terms they are revocable,) the legislatures of subsequent years would not have been bound by the declaration. The necessary power of the legislature over all subjects of internal police being a part of the general grant of legislative power given by the constitution, cannot be sold, given away or relinquished."

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In *Calder v. Kurby*, 5 Gray, 597, a license to sell intoxicating liquors had been granted for a certain period, but before the expiration of that period it was annulled, and it was urged upon the argument in behalf of the plaintiff that the license was a contract and within the protection of the constitution of the United States. But the court overruled this claim, and Mr. Justice BIGELOW, in giving the opinion of the court, says: "The whole argument of the counsel for the plaintiff is founded on a fallacy. A license authorizing a person to retail spirituous liquors does not create any contract between him and the government. It bears no resemblance to an act of incorporation, by which, in consideration of the supposed benefits to the public, certain rights and privileges are granted by the legislature to individuals under which they embark their skill, enterprise and capital. The statute regulating licensed houses has a very different scope and purpose. It was intended to restrain and prohibit the indiscriminate sale of certain articles deemed to be injurious to the welfare of the community. The effect of a license is merely to permit a person to carry on the trade under certain regulations and to exempt him from the penalties provided for unlawful sales. It therefore contains none of the elements of a contract. * * It is manifest that this statute, like those authorizing the licensing of theatrical exhibitions and shows, sales of fireworks and the like, was a mere police regulation, intended to regulate trade, prevent injurious practices, and promote the good order and welfare of the community, and liable to be modified and repealed whenever, in the judgment of the legislature, it failed to accomplish these objects."

Decisions to the same effect, supported by equally cogent reasoning, may be found in the cases of *State v. Holmes*, 1 Chand., 225; *Fell v. The State*, 42 Md., 71; *Beer Company v. Massachusetts*, 97 U. S. R., 25; *Stone v. Mississippi*, 101 id., 814; *Moore v. The State*, 48 Miss., 147.

In *People ex rel. Beller v. Wright*, 3 Hun, 306, and in *People ex rel. Presmeyer v. Board of Commissioners of Police and Excise*, 59 N. York, 92, under statutes almost

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identical with our own, the relators had been granted licenses to sell intoxicating liquors, and before the licenses expired had been summoned to appear before the respective boards granting the licenses, to show cause why they should not be revoked for specified violations of the statute relative to the sale of liquors. The relators appeared and objected to the proceedings for the same reasons as were urged in the case at bar, and thereupon as here applied for writs of prohibition, which were denied by the courts, and very able opinions were given in both the cases showing the fallacy of the arguments for the relators and fully sustaining the right to revoke the licenses, without giving the relators any opportunity to be heard before a jury upon the question whether or not they had been guilty of violating the laws relative to the sale of intoxicating liquors.

In *Commonwealth v. Moylan*, 119 Mass., 109, and *Commonwealth v. Hamer*, 128 id., 76, licenses to sell intoxicating liquors were revoked on hearing before the mayor and aldermen by whom they had been granted, and it was held they were subject to forfeiture in that manner.

We forbear further citations that might be made, for the authorities already adduced furnish most ample vindication of the judgment rendered by the Superior Court.

There was no error in the judgment complained of.

In this opinion the other judges concurred.

EDWARD WILLETTS AND OTHERS' APPEAL FROM PROBATE.

*W*died within a probate district in this state, leaving property to be administered upon, and a will there made attested by only two witnesses. The probate court granted administration on her estate, finding in the order that she was there domiciled and died intestate. Afterward the executors named in the will had it proved in a surrogate's court in the state of New York, (by the laws of which the will was valid,) upon a citation of all parties interested. An appeal was taken from this decree to the Supreme Court of that state, in which it was found that the testa-

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trix was domiciled in the state of New York at the time of her death and the decree of the surrogate's court was affirmed. Held—

1. That this judgment was conclusive upon all persons who were parties to the proceeding, as to the question of *F*'s domicil.
2. That it was the duty of the probate court here, upon application of the executors, to admit the will to probate, for the purpose of ancillary administration.

APPEAL from a decree of the probate court of the district of Greenwich, denying the probate of a will; taken to the Superior Court in Fairfield County. The following facts were found by the court:—

Alice Fowler died at Greenwich in this state February 7th, 1875. Soon after her death, the court of probate for the district of Greenwich granted administration upon her estate to one William C. Field, and in the decree found that she had her domicil within that district at the time of her death, that she had died intestate therein, and that at the time of her death she had goods and estate whereof administration appertained to that court. This decree was passed on the 8th of March, 1875.

Alice Fowler at the time of her death left an instrument purporting to be a last will and testament, executed December 6th, 1874, in Greenwich, and attested by two witnesses only, in accordance with the laws of the state of New York.

At a surrogate's court, held for the county of Westchester, in the state of New York, in the town of White Plains, on the 21st day of February, 1876, upon motion of the executors named in the will, and upon due notice and citation issued from the court to all parties concerned, the will was duly proved and a decree of the surrogate's court was passed admitting the will to probate and establishing it as a will of real and personal estate.

An appeal was taken from this decree to the Supreme Court of the state of New York, and from thence to the Court of Appeals, and upon the appeals such proceedings were had that the question whether Alice Fowler was domiciled in the state of New York or in the state of Connecticut at the time of her death, was tried by a jury upon a feigned issue framed for that purpose before the Supreme

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Court, to which by the laws of New York such appeals were taken, being a common law court of general jurisdiction. The jury found by their verdict that at the time of her death she was domiciled in the state of New York; whereupon judgment was rendered by the Supreme Court affirming the decree of the surrogate's court; which judgment of the Supreme Court and decree of the surrogate's court have never been annulled or reversed. The parties to the present appeal were all parties to the proceedings in the state of New York.

A large portion of the property which Alice Fowler left at her death was in the state of New York. Soon after her death Field, who had been appointed administrator by the probate court in this state, removed all the personal property belonging to her estate, of which the greater part consisted of money in savings banks, from the state of New York into this state.

On the 6th of December, 1878, Field having resigned his trust as administrator, the court of probate, appointed in his stead one John G. Reynolds, who thereupon became possessed of all the property and estate of Alice Fowler.

After the will was proved in the state of New York, the executors therein appointed, having been duly approved and qualified in the surrogate's court for Westchester County, proceeded to administer upon the estate in the state of New York, and also made demand upon Reynolds for all the property of the estate in his hands, in order that they might administer thereon, but he refused to deliver it to them.

Thereupon a true and attested copy of the will, with a true and attested copy of the records and proceedings upon the probate of the same in the surrogate's court, and of the proceedings of the Supreme Court, was offered in the court of probate for the district of Greenwich, and an application was made by the executors that the will should be admitted to probate in that court, and administration granted thereon ancillary to the administration in the state of New York; but the court denied the application, and refused to admit

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the will to probate; from which decree of the court the present appeal was taken.

Upon these facts the case was reserved for the advice of this court.

E. W. Seymour and N. R. Hart, for the appellants.

1. It is undoubted law that a party within the territorial jurisdiction of a court, and served with process, or one who submits himself to its jurisdiction by appearance, *in a controversy within the cognizance of the court*, is bound by the judgment pronounced therein, in every court in the land, unless annulled or set aside by appeal or proceedings in error. *Pennoyer v. Neff*, 95 U. S. Reps., 729; *Bank of North America v. Wheeler*, 28 Conn., 489. The parties to these proceedings were all parties to the proceedings in New York *by appearance*, and it is conceded that those proceedings were within the cognizance of its courts.

2. The question of domicil was made a distinct issue in the proceedings in New York, and its determination was the very essence of the judgment pronounced therein. Furthermore, in the Supreme Court this question was separated from the proceedings purely probate in their nature, and, by means of a feigned issue framed especially for that purpose, it was submitted to the decision of a court of general jurisdiction, in a trial had to a jury, according to the course of the common law. *Sutton v. Ray*, 72 N. York, 482, 484. "In respect to a court of general jurisdiction, it is to be presumed that the court had jurisdiction till the contrary appears. But the want of jurisdiction may always be shown by evidence, except when jurisdiction depends upon a fact that is litigated in a suit, and is adjudged in favor of the party who avers jurisdiction. Then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction, until set aside or reversed by a direct proceeding upon appeal or writ of error." 7 Wait's Actions & Defences, 182; *Wright v. Douglass*, 10 Barb., 97; *Holcomb v. Phelps*, 16 Conn., 135; *Sears v. Terry*, 26 id., 281; *First National Bank v. Balcom*, 35 id.,

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851, 859. By the judgment of the New York Supreme Court, the question of the domicil of Alice Fowler became "*res adjudicata*" between these parties, and no longer an open jurisdictional fact. *Hungerford's Appeal from Probate*, 41 Conn., 327; *Supples v. Cannon*, 44 id., 428, and note on page 431.

3. The New York judgment is conclusive of the fact of domicil, notwithstanding the grant of administration made to Field by the probate court in Greenwich, and its finding that the deceased belonged in that district. This finding was by a court of limited jurisdiction, and of a jurisdictional question, in an *ex parte* proceeding. And this court has held that "the judgment of a court of limited jurisdiction is never conclusive of a jurisdictional question. Its jurisdiction 'may always be controverted.'" *Sears v. Terry*, 26 Conn., 282; *First National Bank v. Balcom*, 35 id., 359; *Olmstead's Appeal from Probate*, 43 id., 123; *Culver's Appeal from Probate*, 48 id., 173. And in each of these cases the right of the Superior Court to ignore the finding of the probate court on the question of domicil was sustained by this court.

4. It is not necessary to our conclusion that the grant of administration by the probate court of Greenwich should be wholly *coram non judice* and void. Such grant would be sustained upon the ground that there was estate within the district to be administered upon. There being assets within its jurisdiction, the administration is proper as *ancillary* to the domiciliary administration in New York. 3 Redfield on Wills (3d ed.), 26. The administration in Connecticut was proper, as the parties might never take out administration or prove a will in the *domiciliary* jurisdiction. *Stevens v. Gaylord*, 11 Mass., 256, 263. The proceedings would be of the nature of proceedings *in rem*, like proceedings by attachment against non-resident debtors having property within the state. Upon such proceedings, the right of the administrator to hold possession of the property of the decedent for the benefit of creditors and heirs, is established by a judgment *in rem*, but such pro-

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ceedings do not determine who the creditors are, still less who the heirs are and what is the law of distribution. The cases of *Pennoyer v. Neff*, 95 U. S. Reps., 726, and *Bartlett v. Spicer*, 75 N. Y., 528, lay down the rule that in no case whatever, where there is no service of process, nor any appearance, is a judgment or decree of any effect except as *in rem*. It is of no effect *in personam*. That is, as against specific property of a non-resident debtor, or property covered by the mortgage of a non-resident mortgagor, or against the estate of a deceased person for the purpose of satisfying creditors, the courts may proceed *in rem* by attachment, foreclosure, or the appointment of an administrator.

5. The proceedings in New York to establish the will involved the rights of the parties thereto under the will, and were personal in their nature. The proponents sought to establish the will because they were interested to do so. The contestants sought to defeat it because their interests were involved. The judgment of probate finally determined these conflicting claims, and was conclusive as a judgment *in personam* upon every question litigated. And in these proceedings the fact of domicil, as necessary to establish the validity of the will, was no more a jurisdictional question than is the fact of the place of contract when the validity of a contract depends upon the *lex loci contractus*.

6. The will is entitled to probate in our courts, notwithstanding it was not executed in accordance with our statute. Our statute concerning the execution of wills (Gen. Statutes, p. 369, sec. 2), relates only to wills of persons domiciled in this state. *Irwin's Appeal from Probate*, 33 Conn., 137. If the decree of the courts of New York is valid, the question where the will was executed can not now be gone into by our courts, but this is, and must be held to be, a will "executed according to the laws of the state where executed," and therefore entitled to be "admitted to probate in this state, and effectual to pass any estate of the testator in this state." If the question could now be gone into, it would be a most narrow and vicious construction of

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the statute to hold that a will, executed during a temporary absence by a citizen and domiciled resident of the state of New York, was not a will, to all intents and purposes within the meaning of the statute, executed in New York. It would be a perversion of the liberal intent of the statute, which is, that the will of a citizen of another state which is good for probate there shall be good here. Again, the statute was not passed to affect the case of a demand for probate of a will already probated in another state, but to provide for cases where our own citizens, temporarily absent, themselves ignorant of the requirements of our law, and employing counsel equally so, should execute wills according to the laws of the state where drawn, but not in accordance with our laws. It had not in view at all the probate of foreign wills nor the subject of ancillary administration.

J. B. Curtis, for the appellees.

1. The question is, whether the will in question can be admitted to probate in the district of Greenwich in this state. If Alice Fowler was domiciled in Greenwich at the time of her decease, then her will, being attested by only two witnesses, is void under the statute of this state and cannot be probated here. If she executed it in Connecticut with only two subscribing witnesses, then it cannot be admitted to probate under the statute as it now stands. Rev. Statutes, p. 369, sec. 2. The statute forbids in terms the probate of such a will, and if she was domiciled here when she executed it it cannot be admitted to probate here. *Irwin's Appeal from Probate*, 33 Conn., 135.

2. That she was domiciled in this state at the time she executed the will appears from the will itself, which describes her as of Greenwich in this state, and by the finding of the court of probate that she was domiciled here at the time. And this fact is not contradicted by the finding of the jury which tried the question of domicil in the state of New York. If this doctrine is correct then the court of probate for the district of Greenwich could not admit the

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will to probate; and this seems to have been the understanding of the legislature, which has since provided for just such a case as the one presented. Public Acts of 1882, p. 167.

3. This view of the matter does not leave the proponents remediless. If the will is such that it can not be probated, it does not follow that the court can not consider it on application for distribution and to have administration in this state declared ancillary to administration in the state of New York, and the property transmitted there for distribution in accordance with the laws of that state. *Parsons v. Lyman*, 20 N. York, 103. The statute of 1882 does not provide for the probate of a foreign will, only for recording it.

4. But a very important question arises here: Was the question of domicil at all material, and did it make any difference whether Alice Fowler was domiciled in the state of New York or not? By the statute of New York no will of personal estate made by a person not being a citizen of that state shall be admitted to probate, unless such will "shall have been executed according to the laws of the state or country in which the same was made." N. York Rev. Statutes, p. 152, secs. 84, 85; *Matter of Roberts's will*, 8 Paige, 446. Under the provisions of the New York statute it must appear somewhere in the record that the surrogate's court found that she was a citizen of New York at the time she executed the will, in order to give that court power to consider the question of domicil, for if she was not a citizen at that time that court had no jurisdiction to decide upon the question of domicil nor could the Supreme Court consider that question on appeal. That this question of domicil was immaterial upon the probate of the will is shown by the decisions of that state. *Matter of Gillman's will*, 38 Barb., 864; 1 Redfield on Wills, 854. Nor is it a material issue in the probate of a will whether the deceased had her domicil within the jurisdiction of the court where the will is proved. The question of domicil could only arise in this case between the executor claiming

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under the will and those parties contesting his appointment. It was not a question between the heirs and devisees with respect to distribution, and can not so be considered. In order that a judgment or finding shall be conclusive upon certain facts, those facts must be material to the issue, and no judgment or finding upon immaterial facts, even if the parties should agree that the court might make a finding upon them, will under any circumstances be deemed conclusive. *Freeman on Judgments*, sec. 271; *Campbell v. Consalus*, 25 N. York, 613; *Wolfe v. Washburn*, 6 Cowen, 262.

5. The court of probate here having first entertained jurisdiction and decided the question of domicil, it was not in the power of the court of a neighboring state to make a different decision which would be binding on the court where the original finding was made. The former judgment was final and conclusive unless appealed from, and cannot be called in question by any collateral proceeding. *Bush v. Sheldon*; 1 Day, 172; *Judson v. Lake*, 3 id., 326; *Lockwood v. Sturdevant*, 6 Conn., 388; *Gates v. Treat*, 17 id., 892; *Dickinson v. Hayes*, 31 id., 422; *Mix's Appeal from Probate*, 35 id., 122; *Freeman on Judgments*, secs. 319, 320. And this court says in *Hall v. Paine*, 47 Conn., 431, that one judgment can not be supplemented by another, and again, further on, "one judgment, though for a part only of a cause of action, is an absolute bar to another, and a satisfaction of the whole." *Burritt v. Belfy*, 47 Conn., 323; *Turner v. Davis*, 48 id., 397; *Nuckolls v. Irwin*, 2 Nebr., 60. The decree of the court of probate for the district of Greenwich was not considered, put in evidence, or in any way passed upon, by the court in New York, and is therefore in no wise impeached by the proceedings in that state, and is final and conclusive until regularly set aside. Distinct actions upon the same subject matter may be prosecuted in different states at the same time; but the judgment first rendered must prevail, otherwise there would be a direct conflict of jurisdiction; and if, after the first judgment, judgment should be rendered in another jurisdiction,

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the court in which the first judgment was rendered would not be compelled to vacate its own judgment to sustain the foreign judgment. Such a doctrine as that contended for would destroy all comity between states and therefore should not be entertained.

PARDEE, J. (After stating the facts.) It is urged by the appellees that the will in question is not valid in the state of New York because it was executed in this state; that the probate court in this state having first decided the question as to the domicil of the testatrix at her death, it was not in the power of the court in New York to make a contrary decision which would be binding on the probate court; and that our statute (Gen. Statutes, p. 369, sec. 2,) providing that "all wills executed according to the laws of the state or country where they were executed may be admitted to probate in this state and shall be effectual to pass any estate of the testator situated in this state," excludes this will.

Presumably the probate court for the district of Greenwich granted letters of administration upon the estate of Alice Fowler without notice to any person in interest, at the request perhaps of an heir, perhaps of a creditor, upon the representation that she died intestate, a resident, and leaving estate in that district; and while in the absence of the probate there of her will this grant would protect the administrator in taking possession of the estate in that district for the protection of creditors there and ultimately of legatees and heirs, yet it does not bar the executors named in a will subsequently found from proving in legal manner and before the proper tribunal in the state of New York that she died resident there, leaving a will valid according to the laws of that state for the purpose of passing title to both real and personal property; nor does it bar them, having duly proved the will in the state of residence at death, from the right to be entrusted by the court of probate in Greenwich with ancillary administration.

It is not a matter of legal necessity that a grant of letters of administration should control the disposition of an estate

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to final distribution. Such grant must yield to the superior force of proof made, either that the supposed decedent is living, or that he left a valid will subsequently found, or that he died resident in a district other than that assuming jurisdiction.

The judgment in New York is that of a court of record, of general jurisdiction, proceeding according to the common law; in other words, of a court having full power to investigate and decide facts and called upon in due course of law so to do. All parties to the proceeding before us were either voluntarily or upon proper compulsion within the jurisdiction of and before that court.

The judgment there rendered was the first in order of time to conclude them upon the question as to the place of residence of the testatrix at the time of her death. Since its rendition none of them have had the right to deny in any court the fact as there established; they cannot now re-open the issue there made and determined against them. And the fact that upon and because of this determination of the question of domicil the will was admitted to probate in the state of New York, conclusively establishes, so far as the parties to that proceeding are concerned, in all courts, that it is the will of a person there resident at death and that it is there valid both as to real and personal estate. This being so, the executors have the right to prove it in this state for the purposes of ancillary administration.

The Superior Court is advised to reverse the decree of the probate court of Greenwich.

In this opinion the other judges concurred.

Crane v. Eastern Transportation Line.

**CHARLES S. CRANE AND ANOTHER *vs.* THE EASTERN
TRANSPORTATION LINE.**

The plaintiffs in their declaration alleged the loss of a cargo of grain by the sinking of a canal boat towed by the defendants, and alleged that the negligence of the defendants caused the loss. The defendants demurred, the demurrer was overruled, and the case was heard in damages. On this hearing no evidence was offered by either party as to the negligence of the defendants or the absence of it. The court found the actual damage to be \$5000, but awarded only nominal damages. This court reversed the judgment on the ground that the burden of proof with regard to negligence rested on the defendants, and that in the absence of all proof they were to be considered guilty of negligence. The case went back to the lower court, when the defendants moved to be allowed to plead the general issue and have the case tried again upon the facts. Held that, the actual damage having been found and upon a trial in which no exception had been taken, the defendants were not entitled to plead anew and have a further hearing upon the facts, but that it was the duty of the lower court to render judgment against the defendants for the \$5000.

The finding as to the loss of the cargo was only that "while at *P* during the night the canal boat sank and the entire cargo was lost." Held that, although this was not a finding that the loss was caused by the negligence of the defendants, yet that that fact was sufficiently established by the averment of the declaration that the loss occurred through their negligence, and the admission of the truth of this averment by the demurrer.

The finding of the court below contained the following paragraph: "The plaintiffs offered no evidence to prove negligence on the part of the defendants, and so the court does not find the defendants guilty of negligence. The defendants offered no evidence." Held not to be a finding that there was no negligence on the part of the defendants, but only a statement that nothing was found on the subject.

TRESPASS ON THE CASE for the loss of a cargo of grain which was being towed by the defendants, a joint stock corporation; brought to the Superior Court. The same case was before this court at a former term (48 Conn., 361,) when the judgment of the court below, awarding only nominal damages on a hearing in damages after a demurrer overruled, was reversed by this court on the ground that the actual damage, (found to be \$5,007.66,) should have been awarded. The facts are fully stated in the former report of

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the case. The case was remanded to the Superior Court, where the defendants claimed the right to plead the general issue, and have the case heard again upon the facts. The court (*Hovey, J.*.) denied the claim of the defendants, and rendered judgment for the plaintiffs to recover the amount of the actual damage. The defendants brought the record before this court by a motion in error.

T. E. Doolittle and *R. E. DeForest*, for the plaintiffs in error.

W. K. Seeley, with whom was *E. W. Seymour*, for the defendants in error.

PARK, C. J. It is important to consider how this case stood in the trial court on the hearing in damages.

The defendants had demurred to the plaintiffs' declaration, the court had adjudged the declaration sufficient, and the defendants had neglected and refused to plead further to it, or take any measures to review the judgment of the court upon the demurrer. In this state of things there was but one course left to be taken, and that was a hearing in damages. The parties came before the court for such hearing. The plaintiffs proved the value of their property destroyed at the time of the injury complained of, together with such other facts as pertained to the case. The defendants had a full opportunity to offer evidence upon the question of their negligence, which was the basis of the suit, but they neglected to improve it, and rested their case without offering any testimony. There was no parol evidence before the court on either side regarding the defendants' negligence, and nothing whatever for the judgment of the court to rest upon touching the matter, except the presumption of law arising upon the demurrer in connection with the amount of the plaintiffs' loss which had been proved. In this condition of the case both parties rested, and there was nothing remaining to be done but to determine the amount of damages that the plaintiffs should

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recover. Up to this time there had been no rulings of the court on questions of evidence, and nothing whatever had arisen that could lay the foundation for a new trial. The case had gone up to final judgment clear of all questions that could be reviewed. But the case still remained for judgment, and the only question regarding it was, whether the plaintiffs should recover the full amount of their damage or nominal damages only.

Now, suppose the court had reserved the case for the advice of this court, instead of deciding it; what would have been its advice? Manifestly, in the light of its decision on the motion in error, it would have been to render judgment for the full amount of the plaintiffs' damage, and that would have ended the case. The defendants would never have asked to be permitted, much less have claimed the right, to go back of all that had been done, and be allowed to change their pleadings and try the case *de novo*, when they had taken their chance of success in the course they had chosen to pursue, and had lost. Indeed, the door would have been closed to them if the request had been made, as it would have been closed to the plaintiffs if the advice of this court had been for nominal damages. Judge HINMAN, speaking on this subject in *McAlister v. Clark*, 33 Conn., 257, says: "We are aware that some stress is laid by the defendant upon the fact that the judgment of the Superior Court had not been entered up, in fact, at the time he made his motion. But the advice of the Supreme Court of Errors had been given to enter it up, and the parties knew precisely what it would be, and to allow advantage to be thus taken of the interval between the giving of the advice and the actual rendering of the judgment, is the same in effect as to allow a change of plea after judgment is in fact rendered." The principle of that case applies with all its force to the present one. The judgment of the trial court had to be for the plaintiffs to recover one or the other of two sums; either for the sum of \$5,007 $\frac{66}{100}$, or for a nominal sum. There was no other alternative. No other question was at issue. The court rendered judgment

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for the plaintiffs to recover the smaller sum. This court held that the court erred in so doing. This rendered it absolutely certain that the court ought to have rendered judgment for the larger sum; that any other judgment would be erroneous. Surely, the case comes fully within the principle of *McAlister v. Clark*. And in the language of Judge HINMAN, "to allow advantage to be taken of the interval between the judgment of this court and the final rendering of judgment in the court below would be the same in effect as to allow a change of the pleadings after such judgment had, in fact, been rendered." There is no error in this respect.

The defendants further claim, that the finding of facts does not sustain the judgment that was rendered and that it is therefore erroneous.

This claim is based on the following finding of the court: "The plaintiffs offered no evidence to prove negligence on the part of the defendants, and so the court does not find the defendants guilty of negligence. The defendants offered no evidence in the cause."

It is claimed that this is a finding that the defendants were not guilty of negligence. We do not so understand it. We construe it to mean that the court makes no finding whatever on the question of the defendants' negligence in fact, because the plaintiffs offered no evidence on the subject. The court could not have made any other finding as the case stood, for there was no evidence before the court tending to show whether the defendants were or were not guilty of negligence in fact. There was nothing for the court to find, and nothing upon which to base a finding of fact. The admissions of the demurrer, taken in connection with the proof of the amount of the plaintiffs' damage, this court held established a *prima facie* case in favor of the plaintiffs for the recovery of the full amount of their damages. This, though not a basis for a finding of facts, was sufficient to sustain the judgment that was finally rendered.

Again, it is claimed that it no where appears in the find-

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ing that the plaintiffs' loss was attributable to the act or negligence of the defendants; that all that appears in the finding on this subject is, that "while at Port Morris during the night the canal boat sank, and the entire cargo was lost." For aught that appears, it is said, it might have been struck by lightning; or its sinking may have been caused by the wrongful act of a third person, or by the act of the plaintiffs' servant in charge of the boat and cargo. This is simply presenting the claim we have already considered in a different light. The plaintiffs' declaration fully sets forth that the loss occurred through the negligence of the defendants. The defendants demurred to the declaration, and thereby conclusively admitted, to the extent of a nominal sum in damages, that the loss occurred as set forth in the declaration. And when the plaintiffs proved by parol evidence the amount of their loss, as they did on the hearing in damages, the admissions of the demurrer extended to the entire amount sufficiently to establish a *prima facie* case in favor of the plaintiffs for a recovery of that amount. In this condition of the case this court held that the burden of proof was on the defendants to show by evidence that they were not in fact negligent in the matter; and if they established the fact, they would thereby do away with the plaintiffs' *prima facie* case, and leave them to recover only to the extent that the demurrer conclusively admitted, to wit, a nominal sum in damages. Now on the hearing in the court below the plaintiffs proved the amount of their loss. Without any further evidence they then had established a *prima facie* case for the recovery of the full amount. But no parol evidence was offered by either party on the subject of the defendants' negligence in fact. The plaintiffs' *prima facie* case then remained; and it stood not only when the erroneous judgment was rendered, but when the correct judgment was finally rendered.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

Taylor v. Keeler.

JOSEPH TAYLOR vs. PHILIP B. KEELER.

A declaration alleged that the plaintiff was owner of a tract of land (describing it,) with a stream of water running through it and a grist-mill thereon, and that the defendant, by the wrongful erection and maintenance of a dam across the stream below, had obstructed the water so as "to cause it to flow back on said land and against the wheel of said mill, whereby the working of said mill was prevented and the plaintiff deprived of the use and profit of said mill." The court below found that the water was set back over a part of the land, but not far enough to reach the wheel of the mill or affect its operation. Held that there could be no actual damages awarded for the flowing of the land, none having been alleged.

And that there could not be nominal damages awarded for the technical injury of overflowing the land below the mill, because the plaintiff had made his whole claim not only expressly but exclusively for damage to the mill.

TRESPASS ON THE CASE for damage by wrongfully setting back the water of a stream; brought to the Superior Court. The declaration was as follows:—

That on and before the first day of January, 1873, the plaintiff was and ever since has been lawfully possessed of a tract of land containing about eighteen acres of land, more or less, and a certain grist-mill thereon standing, with the appurtenances, situated in said Ridgefield and bounded and described as follows: [describing it.] And the plaintiff before and on said first day of January, 1873, and ever since, has had and still has the right to the free course and use of a certain stream of water flowing through said land to carry his said mill; but the defendant, well knowing the premises and contriving to deprive the plaintiff of the use of said stream of water and the profits of said mill, on or about the first day of January, 1873, wrongfully erected a dam across, and placed a great number of stones, boards, planks, logs and timbers in said stream of water on the land of the defendant and below said mill, and raised said dam more than five feet high, so as to obstruct the running of the stream of water in its natural course and to cause it to flow back on the said land and against the said water wheel of

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the said mill of the plaintiff, whereby he prevented the movement and working of said mill for divers days and times between said first of January, 1873, and the commencement of this suit, and deprived the plaintiff of the use and profits of his said mill; to his damage the sum of five thousand dollars; and for the recovery thereof, with costs, the plaintiff brings this suit.

The case was tried to the court, on a general denial, before *Hitchcock, J.* The court made the following finding of facts:—

Since June, 1862, the plaintiff has been and now is seized and possessed of the premises described and claimed by him in the declaration. Upon them there is, and has been from time immemorial, a grist-mill operated by the power of the Norwalk river, which flows through the premises in a southerly direction. On the premises, a short distance south of the grist-mill, is a small building which was formerly supplied with water power from the grist-mill pond and used for carding wool and at times for distilling, but which has not been used except for storage purposes during the past twenty-three years.

Since January, 1845, the defendant has been and now is seized and possessed of the tract of land below and adjoining the plaintiff's premises on the south. In 1857 the defendant erected upon his land a grist-mill and mill-dam on the Norwalk river.

During the three years next preceding the institution of this suit, the defendant maintained a dam across the river on his tract, and from time to time erected flashboards on the dam, removing them in times of high water and replacing them in times of low water.

The evidence was not sufficient to enable the court to find whether or not the main and permanent part of the defendant's dam was above the height to which he might lawfully raise the water of the river; but the whole of the flashboards were above such lawful height; which fact was known to the defendant.

By means of the flashboards the defendant wrongfully

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and unlawfully caused the water of the river to set back upon the plaintiff's premises, to his damage, but the water was not so set back far enough to actually reach and affect the workings of the grist-mill wheel or machinery as heretofore constructed and operated.

The defendant objected that, under the declaration, no evidence of damage could be received except of damage to the grist-mill specifically, and that no damages could be awarded for the defendant's wrongful setting back of the water upon the plaintiff's premises, except for an injury to the grist-mill and the grist-mill right.

But the court held that damages might be awarded for wrongfully and unlawfully setting back the water of the river upon any part of the plaintiff's premises described in the declaration, and that the defendant's obstruction of the natural and rightful flow and fall of the water on those premises was an injury for which the plaintiff might recover damages under his declaration. And the court thereupon rendered judgment that the plaintiff recover \$100 damages for the injury caused by the flashboards, together with costs of suit.

The defendant brought the record before this court by a motion in error.

L. D. Brewster and A. H. Averill, for the plaintiff in error.

W. F. Taylor and W. R. Smith, for the defendant in error.

GRANGER, J. (After stating the facts.) What are we to regard as the gist of this action? For what injury is the plaintiff claiming compensation in damages? Is it for an injury to his land or to his mill?

Clearly the land is mentioned only incidentally. No injury to it is alleged. The sole injury set forth in the declaration, so far as we can see, is the injury to the plaintiff's mill. The facts with regard to this are stated with directness and precision. The allegation is, and there is no other of any injury whatever, that the defendant by his

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dam wrongfully caused the water of the stream "to flow back on the said land and against the said water wheel of said mill of the plaintiff, whereby he prevented the movement and working of said mill for divers days, &c., and deprived the plaintiff of the use and profits of his said mill." The defendant might properly understand from these allegations that the only claim that he was to meet was that of having injured the plaintiff in the use of his mill. That claim he was prepared to meet and it appears by the finding that he met it successfully. It is found that the water "was not set back far enough to actually reach and affect the working of the grist-mill wheel or machinery."

But the defendant was not bound to be prepared to meet a claim that the plaintiff had been damaged by the overflowing of any part of the eighteen acres described in the declaration. The declaration gives him no intimation of such a claim. It is an elementary rule of pleading that the plaintiff must, in his declaration, give the defendant fair notice of what he claims, and in an action for consequential damages must state the consequences which he claims to have resulted from the wrongful act charged. Chitty says (Pleading, Vol. I., 255,)—"The declaration must allege all the circumstances necessary for the support of the action and contain a full, regular and methodical statement of the injury which the plaintiff has sustained, with time and place and other circumstances with such precision, certainty and clearness that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea, and that the jury may be enabled to give a complete verdict upon the issue, and that the court consistently with the rules of law may give a certain and distinct verdict upon the premises." Another reason why such certainty as this rule prescribes is required as to the declaration and the judgment, is that the defendant may plead the judgment in bar to any subsequent suit for the same injury.

It will be seen by reference to the forms for declarations

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in actions of this sort, as prepared by Judge SWIFT (2 Digest, 555,) that the present declaration follows the form there given for a case of "obstructing and flowing water back on the mill of the plaintiff." On page 556 is found a form for a case of "flowing the plaintiff's meadow." In this form, after alleging ownership, describing the land, and averring that the defendant erected a dam across a certain brook below the land of the plaintiff and caused the water to set back upon and overflow the plaintiff's land, it concludes as follows:—"Whereby the grass of the plaintiff growing on said land has been spoiled, of the value of — and said meadow has been made worse and has become miry and almost impassable." Thus it will be seen that the forms for the two cases are essentially different, and that in the latter case, which is the only one applicable to an injury to the plaintiff's land by overflowing it, it was an essential part of the form that the damage to the land itself should be averred, and with directness and particularity.

We do not mean to be understood as saying that there can be no recovery of nominal damages where a clear trespass or injury is alleged with no averment of actual damages except in the general *ad damnum* clause. The court will as a general rule grant nominal damages for the invasion of the plaintiff's rights. But here, as we have shown, the plaintiff himself precludes all claim for even nominal damages by making his whole claim, not only expressly but exclusively for damage to his mill. It is on this alone that he counts and for this alone that he sues; and it is only in accordance with his own statement of his case that he must recover for this or for nothing.

The judgment is erroneous and is reversed.

In this opinion the other judges concurred.

Andreas v. Hubbard.

JEREMIAH S. ANDREAS vs. JOHN W. HUBBARD AND OTHERS.

Where *A* has a mortgage on two pieces of land and *B* acquires a later title to one of them, *B* can not redeem his piece by paying *A* a proportionate share of the mortgage debt, but must pay the whole, and standing on that mortgage foreclose the mortgagor's interest in the other piece; the mortgage debt in that case being apportioned between himself as owner of the equity in one piece and the mortgagor as owning that in the other. And the same rule applies even though *A*, the mortgagee of the two pieces, has himself acquired the equity of redemption in the other piece.

Where however *A*, as mortgagee of the two pieces, asks for or consents to an apportionment, a court of equity will make it.

And where *A*, having acquired the equity of redemption in the other piece, asks for a foreclosure only of the piece of which *B* holds the equity, he will be considered as assenting to an apportionment of the mortgage debt.

The rule of apportionment in such cases is to apply the security to the debt according to its proportionate value. That is, as the value of the whole security is to the value of the particular part, so is the amount of the whole mortgage debt to the amount which is to be paid on redeeming that part.

Where *A* holds a mortgage on two pieces of land and *B* a later mortgage on the second piece and also on a third piece, and the first and second pieces are more than enough to satisfy the first mortgage debt, but the second and third pieces, with the second encumbered, are insufficient to satisfy the second mortgage, it is a rule of equity that the first piece shall be first applied upon *its* mortgage debt, so as to leave as much as possible of the second piece for the benefit of *B*'s mortgage.

This rule is one of easy application where, as in many of the states, the mortgaged property is sold by order of the court and the proceeds applied; but in this state, where the property itself is taken for the debt, the same principle is recognized.

Where *B* holds a second mortgage of one piece of land, previously mortgaged with others to *A*, and also of other lands not covered by *A*'s mortgage, but complicated with still other lands by reason of other later mortgages of those lands to other parties, which later mortgagees give the holders of them by reason of their inadequacy a standing in equity for asking to be allowed to redeem *A*'s mortgage, *A* is not bound, in seeking a foreclosure of his mortgage, to make these other mortgagees defendants.

The right of these parties to redeem *A*'s mortgage would not appear of record and would depend entirely on the fact of their security being insufficient—a fact wholly extraneous, and of which *A* could not be supposed to have any knowledge.

Their duty, if they wished to get the benefit of the property mortgaged to

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A, would be to bring a suit for redemption, or at least to give notice to *A* that they claimed a right to redeem.

Their right to go into a court of equity and obtain a decree for redemption, would not be of itself an existing and recognized equity, but would be a mere equitable relation to the property, and their equity would be established by and depend upon the decree of the court.

And the equity thus decreed would take effect subject to all rights existing at the time the suit was brought.

Where a mortgagee has foreclosed a mortgage and his title has become absolute, the fact that the value of the mortgaged property is greater than the mortgage debt, constitutes no ground of equitable claim on the part of persons interested who were made parties to the suit.

And a party who, if he had gone seasonably into a court of equity could have had a right of redemption decreed in his favor, but who failed to do so, and neglected to give notice to the mortgagee of his claim of a right to redeem, and who had therefore at the time of the foreclosure no such known relation to the property as made it the duty of the mortgagee to make him a party, is not entitled to equitable aid on the ground of such excess of value.

SUIT for a foreclosure; brought to the Superior Court in Fairfield County. The mortgage covered three pieces of land, as to only one of which a foreclosure was now sought. The plaintiff held the mortgage by assignment from an assignee of the original mortgagee. The following facts were found by a committee:

The three tracts of land described in the petition were mortgaged by Albert Seeley to Heth Stevens, to secure the payment of the note of Seeley to Stevens for \$1,000, on the 18th day of May, 1857. The mortgage contained the usual covenants of warranty and seizin. Heth Stevens died January 8th, 1870, leaving a will, in which Hiram Curtis was appointed executor. Curtis accepted the appointment, and, as such executor, on the eighth of August, 1870, sold the mortgage, with a conveyance of the mortgaged lands, to Diantha Curtis. Diantha Curtis sold the mortgage and quitclaimed the lands to Rufus Lockwood, on the 30th of January, 1874. Rufus Lockwood in like manner sold the mortgage and quitclaimed the lands to the petitioner, on the 24th of January, 1878; and the petitioner is now the owner of the note and mortgage. It has never been paid, unless the facts hereinafter found constitute a payment of

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it or of some part of it. Interest has been paid on the note up to the 4th of May, 1874, but none has been paid since that date.

On the 1st of August, 1866, Seeley mortgaged to Alexander Hubbard the tract of land last described in the mortgage to Stevens, to secure his note to Hubbard for \$8,000. This tract was known as the "Salt Meadow," and is the one as to which the present foreclosure is sought. This mortgage covered several other pieces of land then owned by Seeley, and which were not included in the mortgage to Stevens above mentioned.

On the 19th of September, 1868, Seeley again mortgaged the same premises to Hubbard, to secure two notes, one for \$2,600, and the other for \$1,000.

Hubbard brought his petition to the March term, 1875, of the Superior Court for Fairfield County, for a foreclosure of the two mortgages last mentioned and of certain other mortgages then held by him against Seeley. Hubbard died March 1st 1876, while his petition was pending in court, and it is understood and agreed by the parties to this proceeding, that all the rights which Hubbard had at the time of his decease, in the premises covered by the mortgage sought to be foreclosed in this proceeding, then passed to and vested in John W. Hubbard, George N. Hubbard and William Hubbard, the present defendants, and that they now hold and own the same.

A decree was passed upon that petition, at the December term, 1875, of the court, by force of which the title of John W., George N., and William Hubbard, in all the premises mentioned in the petition, as against Seeley and all persons claiming under him, (the mortgage title in the Stevens mortgage excepted,) became absolute on the 3d day of October, 1876. On that day they became, and ever since have been, the owners of the equity of redemption in the premises now sought to be foreclosed, and have been and now are in possession of them. On the 14th of October, 1876, they caused a certificate of foreclosure to be recorded in the

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land records of the town of Stamford, in which the premises were situated.

The premises of which they obtained title by this foreclosure, exclusive of the salt meadow now sought to be foreclosed, were worth, at the time they obtained title, \$97,000, and the claims for which they held this property as security was \$90,000.

Seeley also made another mortgage to the petitioner, on the 12th day of August, 1874, to secure his note to him for \$20,000. This deed covered the two tracts first mentioned in the Stevens mortgage. Afterwards, and about the 1st of January, 1878, and before the petitioner purchased the Stevens mortgage, he made an arrangement for the purchase and conveyance to him from Seeley of his interest in the premises covered by his mortgage for \$20,000 and in those covered by the Stevens mortgage; and also arranged with Rufus Lockwood for the purchase of the Stevens mortgage, which Lockwood then held. The business was done by J. B. Curtis, Esq., who acted for all the parties. In pursuance of this arrangement Mr. Curtis prepared the deeds for execution, and Seeley executed his on the 21st, and Lockwood his on the 24th of January, 1878. Both deeds were left with Mr. Curtis, to be delivered to the plaintiff, and they were delivered to him, and left for record at the same time, namely, on the 28th of January, 1878. By the deed of Seeley, the plaintiff acquired title to the two tracts of land first described in the Stevens mortgage, and the defendants have, and claim, no interest in either of the first two tracts. The defendants, by their foreclosure against Seeley, acquired all the title which Seeley then had in the salt meadow, the piece last described in the mortgage, and the determination of this cause can affect the rights of the parties in this tract only.

The petitioner paid nothing to Seeley for his quit-claim of January 21st, 1878. The premises conveyed by that deed were encumbered to the amount of \$23,000, and were worth \$15,000 only.

The value of the third tract, (the premises sought to be foreclosed,) is \$500.

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If these facts do not constitute a payment of the mortgage note described in the petition or of some part of it, there is now due upon the note the sum of \$1,454.33.

Upon these facts the court (*Hovey, J.*.) rendered the following judgment:—

“Upon the facts found, if the plaintiff were seeking to redeem the premises which he is seeking to foreclose, he would be allowed to do so upon his paying to the defendants such a portion of their mortgage debt of \$11,600, as the value of the premises sought to be redeemed bears to the value of the entire premises mortgaged to secure the payment of that debt, less such a proportion of the amount due to the plaintiff upon the Stevens mortgage, as the value of the premises sought to be foreclosed in this suit bears to the value of the entire premises covered by that mortgage. The first mentioned proportion being \$308.60, the proportion last mentioned \$46.91, the difference between the two, being \$256.75, is the sum the plaintiff would be required to pay to redeem the salt meadow, the premises sought to be foreclosed in this suit. The difference between that sum and the value of the salt meadow, as found by the committee, being \$243.25, is therefore the sum which the defendants ought to pay to the plaintiff to redeem the salt meadow.”

The court, therefore, decreed a foreclosure of the defendants unless they should pay the plaintiff the sum of \$243.25 within a time limited by the decree.

The defendants brought the record before this court by a motion in error.

A. S. Treat and C. Sherwood, for the plaintiffs in error.

1. After his deeds of warranty to Hubbard, manifestly Seeley himself had no further claim on the salt meadow on account of the Stevens mortgage, and of course he could not convey to the plaintiff what he did not himself have, so that by these deeds, so far as he and the plaintiff are concerned, the salt meadow was freed from the burden of the Stevens mortgage. When there are conveyances of por-

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tions of a mortgaged estate the rule is quite uniform to charge first with the mortgage debt the portion last conveyed. This is well settled law in this state. *Sanford v. Hill*, 46 Conn., 42, and cases cited. The two other tracts are found to be worth \$15,000. The plaintiff, therefore, must pay his own mortgage debt, of \$1,454.33. Should it be suggested that the rule we have stated does not apply to mortgages, then the court will observe that the mortgage title to the salt meadow had become absolute in the defendants before the plaintiff took his quitclaim from Seeley of the other two tracts and before he became the owner of the Stevens mortgage. So that it can make no difference in this case whether the mortgage is considered a conveyance under the rule when made, or when the equity of the mortgagor is extinguished and the title becomes absolute. But the court below says the plaintiff would be allowed to redeem the salt meadow if he were seeking to do that. If so, then it must be because he has the right to redeem, and if he has that right, then he must have acquired it from Seeley by his mortgage of August 12th, 1874, or by his quit-claim of January 21st, 1878. But after his deeds to Hubbard, Seeley had no right in the salt meadow; most certainly he had none after the foreclosure. The deeds and certificate of foreclosure were recorded. So, therefore, Seeley could neither charge by mortgage nor grant by quit-claim any right in the salt meadow. For "it is a common learning in the law that a man cannot grant or charge that which he has not."

2. The court below, in fixing the sum for which the plaintiff might redeem at \$256.75, has erred in its figures and calculations. The value of the lands mortgaged to Alexander Hubbard to secure the \$11,600 is made a principal factor in the calculation. But their value is not found by the committee nor any facts from which their value can be ascertained. No evidence was offered and no attempt made to find their value. The court assumed their value to be \$19,100, and based its calculations upon that as their value. To make the \$19,100, \$7,500 was added to the

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\$11,600. We suppose this \$7,500 was the difference which the committee found between the value of all the lands, including the salt meadow, embraced in all the mortgages foreclosed by the defendants, \$97,500, and the amount of all the mortgage debts, \$90,000. The court assumed that this \$7,500 is the difference between the value of the lands mortgaged to Hubbard by the two deeds and the mortgage debts, \$11,600, and must also necessarily have assumed that the value of the other lands embraced in all the other mortgages was precisely equal to the mortgage debts secured, \$78,400. There are no facts in the case to warrant either assumption, and the probabilities are altogether that neither of them is true. It does not appear that the salt meadow was included in any but the two mortgages to Hubbard, nor whether the "certain other mortgages" which were included in his foreclosure were given to him or not originally. But even if \$19,100 was the true value of the salt meadow and the other lands embraced in the two mortgages, still the rule adopted and the result arrived at is erroneous. The court seems to have undertaken arbitrarily to adjust some supposed equities between these parties as second mortgagees. The principle stated in *Osborn v. Carr*, 12 Conn., 202, 203, upon which the court relied, has no application to this case. There was a mortgage of two estates, and a second mortgage of one of them, the mortgagor retaining his equity in the other. There the question of equity was between the second mortgagee and the mortgagor. Here the question is between two second mortgagees. Three tracts are mortgaged. In September, 1868, Hubbard holds Seeley's note for \$11,600, and mortgages upon one tract and upon several other tracts for security. Hubbard becomes the holder and owner of other mortgages against Seeley upon other lands amounting to \$78,400. In October, 1876, the defendants, by legal proceedings, extinguished the rights of Seeley and appropriated all the lands covered by all the mortgages. The committee finds that the value of all the lands thus appropriated exceeded the mortgage debts \$7,500. In August, 1874, the plaintiff has

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Seeley's note for \$20,000 and a mortgage upon the other two tracts for security. In January, 1878, the plaintiff under a conveyance from Seeley of his equity, appropriated the two tracts covered by his mortgage. The committee finds that the value of the two tracts was \$8,000 less than the mortgage debt. So the plaintiff through his one mortgage lost \$8,000, and the defendants through their several mortgages gained \$7,500, and the court orders them to contribute from their gain towards making up his loss. In *Osborn v. Carr* the court in finding the amount to be charged against the parties respectively confined its computations strictly to the lands upon which there was a common burden. No regard was paid to the value of the lands mortgaged to Carr and Osborn respectively—whether greater or less than the mortgage debts. It would seem hardly possible they could have been exactly alike in both cases. This is substantially the equitable rule applied in that case, and applicable to this, as found under many different forms of expression. For the removal of a common burden each of several tracts must contribute in proportion to its value. Here is an incumbrance on three tracts. It should be raised by each party in proportion to the benefit which he will receive by its removal. The salt meadow, the defendants' tract, is worth \$500; the plaintiff's two tracts are worth \$15,000; both \$15,500, in proportion of 1 to 31. The incumbrance \$1,454.33 divided by 31 gives \$46.91, which is all the defendants should pay, if anything.

J. B. Curtis, for the defendant in error.

1. The court below estimated our mortgage right in the salt meadow tract on the basis of a redemption. Suppose the Hubbards held the first mortgage and that is valued at \$11,600, while the whole value of the mortgage interest, including the salt meadow tract, is \$19,100, then their interest in the salt meadow tract would be $\frac{11600}{19100}$ of \$500, or \$303.66, subject to the deduction of the mortgage right of Andreas in the salt meadow tract, (supposing Andreas

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to hold the second mortgage on it), which the court finds to be as follows: His mortgage is \$1,454.33, and the whole value of the land mortgaged, including the salt meadow tract, is \$15,500; then Andreas's interest in the salt meadow tract would be $\frac{1454.33}{15500.00}$ of \$500, or \$46.91. This being deducted from \$303.66, as above mentioned, leaves \$256.75, which Andreas would be obliged to pay the Hubbards if the Hubbards held the first mortgage and compelled Andreas to redeem. When Andreas had redeemed the value of the mortgage interest which he would hold as security for the Stevens mortgage of \$1,454.33, the difference between what he would be obliged to pay to the Hubbards, \$246.75, and the value of the salt meadow tract, \$500, would be \$243.25; which the court establishes as the value of Andreas's mortgage interest in the premises sought to be foreclosed. The difference between \$303.66 and \$46.91 being \$256.75, this sum would belong to the mortgagor, in case both the mortgages of Andreas and the Hubbards were paid out of a sale of all the lands, and the balance of \$256.75 would go into the hands of Seeley as mortgagor. But under a strict foreclosure there can be no sale but only a forfeiture, and the question arises, to whom does this mortgage interest of \$256.75 belong? If the Hubbards held the first mortgage it would be forfeited to them, and if Andreas held the first mortgage it would be forfeited to him, and he would be entitled to have it paid. But the court says that the sum of \$256.75 shall be still further reduced by taking said sum of \$256.75 from the value of the salt meadow tract or treating the mortgage interest of both parties as though Hubbard held the first mortgage and as if Andreas had to redeem the Hubbards' interest of \$256.75; leaving Andreas's mortgage interest in the land what it would be if he had to pay the Hubbards' mortgage interest of \$256.75, viz: the difference between the Hubbards' interest of \$256.75 and \$500, or \$243.25, as the sum secured by the salt meadow tract of the \$1,454.33 mortgage. Or in other words, Andreas's mortgage security on the salt meadow tract is \$243.25, and on the other land \$1,211.08; making the amount of his mortgage \$1,454.33.

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2. If the court has made any mistake in this finding it is clearly in favor of the defendants, and they cannot complain. Nor can it be said that the sum to be paid by the defendants should be only \$46.91. For if the burden to be borne by the salt meadow tract is \$46.91 on account of Andreas's mortgage, and \$303.33 on account of the Hubbards' mortgages, then there is a balance of \$256.75 which must belong to some one. And under the defendants' claim it would be the child of nobody. The decree in the court below is fully sustained by the case of *Osborn v. Carr*, 12 Conn., 195; see also 1 Story Eq. Jur., §§ 477, 478. It will be seen by examining the finding that the Hubbards have the whole value of their mortgage secured on another tract and a balance of \$7,000 in addition, which balance they have appropriated by foreclosure. Why, then, should they be allowed to absorb the whole salt meadow tract while we hold the first mortgage thereon? Does our first mortgage give us no prior right whatever? Have we no interest in the salt meadow tract? If we have, then what interest? If the Hubbards have been paid fully in the appropriation of the first tract, what right have they to redeem the second unless they pay the full value of it, \$500?

3. It is claimed that the Hubbards as mortgagees stand in the same relation to Andreas that they would have done if they had purchased the property of Seeley under a covenant of warranty. Seeley first mortgaged the salt meadow tract to Stevens, together with the tract mortgaged to Andreas. Andreas bought or obtained title to the latter tract first by his mortgage from Seeley and afterwards by quit-claim from him. He also purchased at the same time the Stevens mortgage from Lockwood as an independent transaction. The three acts were independent of each other. Andreas did not redeem this property of Lockwood. Let us further examine this claim: By mortgaging to Hubbard Seeley gave notice that he had simply mortgaged this property, not sold it. Now, if he held the equity of redemption it would be simply a presumption in

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law that he would redeem the mortgage and pay the mortgage debt. For the law nowhere presumes that a man will fail to fulfill his obligations, and this is, all the notice the law would give under the claim of the defendants. Now, if we stand in the place of Seeley and have his right of redemption and are affected by him as to the Hubbards' mortgages, we had a right to have legal notice of the foreclosure by the Hubbards. If Seeley by his mortgage to Hubbard placed us in his position, which would be as to him as the second mortgagee, or the same as mortgagor to Hubbard, then when our mortgage was executed on the 12th day of August, 1874, we had the right to redeem of Hubbard through the Stevens mortgage, and Hubbard could not cut us off simply by foreclosing Seeley, for we had acquired rights by our mortgage which neither Seeley nor his mortgagees could affect, unless his mortgagee made us a party to his bill for a foreclosure, which he did not. *Lyon v. Sanford*, 5 Conn., 544.

4. But are we to stand only in the place of Seeley? Do we not stand in the place of Stevens, the first mortgagee, as well? The committee finds that Rufus Lockwood sold and conveyed the Stevens mortgage to Andreas. Could we not acquire Stevens's right to this property by purchase, and, if we did so, because we acquired Seeley's nominal equitable interest at the same time, would that bar us of all the rights which Stevens had or which Lockwood had as his grantee? Suppose we had foreclosed Seeley without taking a quit-claim deed from him, would this have forced us to occupy Seeley's place? If not, simply taking a quit-claim in order to prevent the expense and trouble of a foreclosure would not compel us to stand in the place of Seeley. We do not redeem the Stevens mortgage, but we buy it and pay for it, and so far are entitled to have our rights under it to the same extent as Stevens and Lockwood. We have not been forced to redeem it and therefore are not claiming our right under our equity of redemption, but we are claiming our right under a purchase of the mortgage, which could be no more affected by our previous

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mortgage on the other property or by the quit-claim from Seeley than if we had never held such mortgage or obtained such quit-claim.

5. This case is clearly distinguished from a case where a purchaser by quit-claim takes solely the rights of the mortgagor and is foreclosed and compelled to pay the whole mortgage. Under a foreclosure in the latter case he takes such right of redemption as the law confers upon him. In the former case he takes such rights as are conferred by the terms of his contract. For if the mortgagee Lockwood did agree to and did confer on Andreas all his mortgage title in the salt meadow, it is very difficult to see how the court can take away from Andreas his right to foreclose the same without invalidating the contract as between him and Lockwood. The conveyance of the mortgage interest of Lockwood in the salt meadow tract was a part of the consideration of the purchase and assignment of the mortgage by Lockwood. And can the court say we shall not have that property for which we have paid a full price? Besides it would be grossly inequitable that the Hubbards should obtain from Seeley property worth \$97,000, being \$7,000 more than the whole amount of their mortgages, while we should obtain in value property worth only \$15,000 in satisfaction of our mortgages of \$21,454.83, or \$6,454.83 less than our indebtedness from Seeley.

6. It is very clear that Lockwood could have proceeded against the Hubbards for a foreclosure and compelled them to pay the Stevens mortgage. In that event they would have obtained absolute title to the salt meadow tract, as well as security for their mortgage on the other property mortgaged to Andreas. Suppose that after their foreclosure of the salt meadow tract against Seeley and redemption of the Stevens mortgage of Lockwood, they should have brought their petition to foreclose Andreas; would he be compelled to pay the whole amount of the Stevens mortgage to the Hubbards and they retain the salt meadow besides? This is the necessary result of the defendants' claim; and a claim more inequitable can hardly

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be conceived of. The court below in arriving at its conclusions chose to consider us as in the condition of being obliged to redeem the Stevens mortgage of the Hubbards, after they had been foreclosed by Lockwood and paid his mortgage, and after they had foreclosed Seeley, and by these two acts had acquired an absolute title to the salt meadow tract; and treated a portion of that mortgage as having been paid by the appropriation of the salt meadow tract. We submit that a ruling so favorable to the defendants should not be complained of by them.

PARK, C. J. This case presents a nice question of equity law, and one somewhat difficult of solution.

Albert Seeley in 1857 mortgaged to Heth Stevens three pieces of land to secure a note of one thousand dollars. One of these pieces, the only one as to which the question in the case arises, was called the salt meadow; the other two pieces we will call *A* and *B*. The plaintiff has become vested with all the interest of Stevens in this mortgage and its security.

In 1866 Seeley mortgaged to Alexander Hubbard the lot known as the salt meadow, and several other parcels of land not included in the Stevens mortgage, to secure a note of eight thousand dollars; and in 1868 made a second mortgage of the same real estate to secure two other notes of twenty-six hundred and one thousand dollars. These two mortgages may for convenience be spoken of as one mortgage for eleven thousand six hundred dollars.

The only conflict between the Stevens mortgage and that of Hubbard is in their both covering the salt meadow. Until further facts came in to affect the case Hubbard could not have redeemed the salt meadow without paying the whole of the Stevens mortgage, as the holder of that mortgage was not bound to submit to an apportionment. Upon such redemption Hubbard would have become owner of the whole Stevens mortgage, and could then have foreclosed Seeley the mortgagor, or any other person holding the equity of redemption in *A* and *B*, if they had not paid

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such portion of the mortgage debt as the court should find to be proper upon a just apportionment. *Gibson v. Crehore*, 5 Pick., 152; *Allen v. Clark*, 17 Pick., 47; *Chase v. Woodbury*, 6 Cush., 146; *Smith v. Kelley*, 27 Maine, 287; *Tillinghast v. Frye*, 1 R. Isl., 53; *Lyon v. Robbins*, 45 Conn., 513; 2 Jones on Mortgages, § 1072.

But there are further facts in the case, the effect of which is to be considered. Seeley in 1874 made a mortgage to the petitioner, Andreas, (who had not then become the owner of the Stevens mortgage,) of the two lots *A* and *B*, to secure a note of \$20,000. This presented the case of a prior mortgage covering three pieces of land, and of a later mortgage covering only two of them, and if Stevens and Andreas had been the only parties interested as mortgagees, Andreas would have had the right to require that the whole of the salt meadow, (not included in his mortgage,) should be applied first to the prior mortgage, so as to leave as much as possible of *A* and *B* for his own security, the whole security being inadequate to the payment of both debts in full. The rule as one of equity is well settled, and is easy of application where mortgaged property is sold on foreclosure, as is done in most of our sister states, but the same result would be reached more circuitously under our own law. *Delaware & Hudson Canal Co.'s Appeal*, 38 Penn. St., 516; 1 Hilliard on Mortgages, ch. 13, § 69.

This we say would be the equitable right of Andreas if he and the holder of the Stevens mortgage were the only parties interested as mortgagees. But here comes in the further fact that Hubbard had already (in 1866, eight years before,) taken his mortgage upon the salt meadow and several other parcels of land not included in the Stevens mortgage. We find therefore that when Andreas would crowd the Stevens mortgage over upon the salt meadow, so as to leave for his own mortgage as much as possible of the lots *A* and *B*, that mortgage encounters another mortgage resting on the salt meadow, that is, the Hubbard mortgage; and that too a mortgage which is prior in date and of course in right to his own, Andreas's, mortgage. Andreas has now

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become the owner of the Stevens mortgage, but we do not see that that fact affects the application of the principle involved. So long as he was not the owner of that mortgage it was a question of how far he could crowd that mortgage over upon the salt meadow. Since he has become the owner of it the question is how far he can carry that mortgage over upon the salt meadow, and thus protect his later mortgage on *A* and *B*. It is merely the same question in another form. This is a question of much interest and of some difficulty. We will postpone its consideration for the purpose of considering another that grows out of this relation of the mortgages.

The petitioner contends that as a holder of the second mortgage on *A* and *B* he had acquired such an equitable interest in the salt meadow as gave him a right in some way to reach it, and if in no other way by redeeming the Hubbard mortgage *pro tanto*; and that, as he was not made a party respondent to the Hubbard foreclosure this right of redemption has not been cut off; and he cites *Lyon v. Sanford*, 5 Conn., 544, to the point that every party having an equitable interest in mortgaged property has a right of redemption, and must be made a party to a bill for the foreclosure of the mortgage.

But, in the first place, it is very doubtful whether an interest so remote and uncertain as this can be regarded as an equity. It is rather like those cases, of which there are many, where a court of equity will, on a state of facts that makes it equitable, establish in a party's favor an equity which had no existence before. An illustration of this is to be found in *Jones v. Quinnipiac Bank*, 29 Conn., 25, where it is held that security given to an endorser for his personal protection does not draw to itself any equitable interest on the part of the creditor; so that, if the endorser parts with the security he has done no wrong to the creditor, but only what he had a right to do; but that if the endorser becomes insolvent and the creditor has no other means of collecting the debt, he may go into equity and obtain a decree establishing in his favor an equitable right

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to the security given the endorser. But this equitable right when thus established takes date from that time, and is of course subject to all then existing rights in other parties, so that if the security has been released, or sold, or encumbered in the meantime, the creditor's equity is postponed to the rights so created. In the present case the right of redemption in Andreas, if a court of equity should think it a proper case for the establishment of such an equity in his favor, would be founded wholly on a circumstance not disclosed by the public records, and not to be presumed, namely, that the lots *A* and *B* were insufficient to secure his debt, and that it was necessary for him on that account to resort to salt meadow. It would therefore be a case where the court, in the peculiar circumstances, holds it equitable that he should have this right of redemption, and not a case where he had from the first a fixed equity. This being so, he would take that equity subject to all rights existing at the time he brought his petition. But before he brought his petition the Hubbard mortgage had been foreclosed and the title had become absolute in the present defendants.

Upon the question whether Hubbard in taking his foreclosure was bound to make Andreas a party respondent, because of his remote and possible right to redeem, it is to be considered that there may always be parties who by some extraneous facts, not shown by the public records, may be entitled to equitable aid in establishing a right to redeem. If we go outside of those whose right is manifest upon the public records, there is no knowing where one may stop. The mortgage of Andreas in this case did not touch this property, but only had a right in certain circumstances to crowd over a prior mortgage upon it. There might also be some other mortgage resting on some other piece of land covered by the Andreas mortgage and which had certain equitable rights with regard to that mortgage; and still another, more remote, which pressed in the same way on the mortgage last mentioned; all having a remote, but yet an equitable interest in the application of the salt meadow lot. If Hubbard in looking up the parties whom he was to

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foreclose would be bound to ascertain the rights of all these remote and still remoter parties, it would seem impossible to secure a final and sure foreclosure in such a case. In *Osborn v. Carr*, 12 Conn., 195, it is held that a party purchasing is not bound to search the records of another town for lands that may have been mortgaged with a lot in a particular town, to see whether any such conveyance has been made of the former land as would throw a special burden upon the latter. But in *Hunt v. Mansfield*, 31 Conn., 488, it is held that a purchaser of a piece of land mortgaged with others is bound to take notice from the public records that a conveyance of that other land has been made which throws the burden of the mortgage on the land he is purchasing. Upon that principle, if Hubbard had been buying the salt meadow he would have been bound to take notice that Andreas had a mortgage of *A* and *B* which threw the Stevens mortgage over upon the salt meadow. But does the same rule apply to a mortgagee who already has his mortgage title, and compel him to notice the same conveyance? We think it does not, and for the reason that no conveyance, made after he has taken his mortgage, can increase the incumbrance that lies on the property above his own. The right of Andreas here, regarded as a right of redemption, comes in after, and subject to, the right of Hubbard, and approaches the land in question in a manner entirely indirect and consequential, and by reason wholly of facts not disclosed by the records and which may not exist. He could at any time have gone into a court of equity and had his equity established by a decree. Or he could have given notice to the owners of the Hubbard mortgage of his claim to such an equity. In the absence of anything on the public records which gave notice of the facts on which his claim is based, and of all proceedings on his part to secure his possible rights, we can not regard the owners of the Hubbard mortgage as bound to take notice of his equity and make him a party to their bill of foreclosure.

But, even if this were not so, there is a consideration which practically disposes of this question. The plaintiff claims this right of redemption as a right to redeem the

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salt meadow, by itself, paying the defendants only a proportionate share of their mortgage debt. But it is a well-settled principle, as we have already seen, that a party having a second mortgage upon a part of lands covered by a first mortgage, can redeem only by paying the whole mortgage debt. Here the whole amount of the defendants' incumbrances on the property mortgaged to them is found to be \$90,000, and the whole property worth \$97,500. Now on what ground could the plaintiff claim to redeem the salt meadow on paying a small fraction of this incumbrance? So far as we can see, it is on the ground that the defendants have foreclosed their entire mortgage interest in all the lands. But if the plaintiff's supposed right of redemption is not barred by reason of his not having been made a party to the foreclosure, then the foreclosure fails as to him wholly, and not merely as to the salt meadow; and his right of redemption, and his duty in the exercise of that right, remain precisely what they would have been if no foreclosure had been brought. Now he does not offer to pay the whole \$90,000 debt; it would be idle to pass a decree giving him the right to redeem on making such a payment. Indeed we may assume that there would be no need of coming into a court of equity to get such a right; the defendants would probably be only too glad to assent to such a redemption. A debt of \$90,000 secured by property of the value of \$97,500, is not so well secured but that it may safely be assumed that the creditor would much rather have his money than to take his chance with the security. The accumulating interest on such a sum would, even if the real estate security was fairly productive, very soon consume all the excess of value in the security.

We therefore lay out of the case all consideration of the right of the plaintiff to approach the salt meadow, through any equity of redemption.

We come back therefore to the question, the consideration of which we postponed, whether the plaintiff, as owner of the Stevens mortgage, may, for his protection as a second mortgagee, reach over and appropriate to himself the whole or any part of the salt meadow.

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He claims that he can, on the ground that the security held by the defendants for their entire debt of \$90,000 is of the value of \$97,500, leaving a surplus in their hands of \$7,500—while the salt meadow is found to be worth only \$500; so that they are paid in full, and more than paid, without touching the salt meadow.

This claim is not without plausibility, and perhaps not wholly free from difficulty. There would seem to be a certain degree of justice in it. We think however that when the Hubbard mortgage was foreclosed, and the mortgage title became absolute by the failure of all parties interested to redeem, the question of the value of the premises above the debt was foreclosed with the rest. That value could have been enquired into for the purpose of ascertaining whether it was sufficient to pay and consequently did pay and extinguish the debt; but if a foreclosing creditor gets more than enough to satisfy his debt it is the debtor's loss and his gain. The debtor and those who held under him have had their day in court and can not have another. There must be a quieting of the title somewhere and an end of controversy over the whole matter; and that end is reached when the last day of redemption has gone by and no party has redeemed. We think therefore that this excess of value must be wholly laid out of the case.

When therefore the plaintiff, standing on the Stevens mortgage, endeavors to crowd the Hubbard mortgage off from the salt meadow, it encounters a fixed and not a yielding barrier; a line clearly drawn over which it can not pass; a title absolute and impregnable, subject only to such portion of the Stevens mortgage as may be regarded as equitably resting upon it. If it were not so it is not easy to see why the plaintiff might not take the whole of the salt meadow, and not a mere fraction of it, as the fact of the defendants being overpaid, if a reason for their yielding anything, would be a reason for their being required to give up the whole, since the whole might be taken from them and still leave their debt paid.

The case then becomes simply a question of apportionment.

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ment between the defendants as owners of the salt meadow, and the plaintiff as owner of the Stevens mortgage. Every other fact may be laid out of the case.

It is very clear that if the Stevens mortgage stood by itself, with the equity of redemption in another party, the defendants could not redeem the salt meadow by paying an apportioned part of the Stevens mortgage. The principle we have before referred to would compel them to pay the whole of it. But the plaintiff is now the owner of that mortgage, of his own original second mortgage, and of the equity of redemption in the lots *A* and *B*. The equity of redemption and the mortgage interest thus became merged. It is true that those interests could have been kept distinct if the plaintiff had chosen to keep them so, and would have been so regarded in equity if it was clearly his interest and desire to keep them so. But this question is disposed of by the petitioner's own action in seeking a foreclosure of the salt meadow by itself and asking only for an apportioned part of the mortgage debt. A first mortgagee can never be required to submit to an apportionment of his debt, but can always have one where he consents to or requests it, the rule that requires an entire redemption being founded wholly on his rights in the matter. We have then a simple case of an apportionment of a mortgage debt between two parties who stand in the relation of first mortgagee of several tracts of land, and owner, subject to the mortgage, of one of the tracts, with the first mortgagee assenting to the apportionment and the rights of no other parties intervening. What is the rule of apportionment in such a case? It is clearly that of applying the security to the debt according to its value. Here the whole land covered by the Stevens mortgage is found to be of the value of \$15,500; the salt meadow lot of the value of \$500; the debt \$1,454.33. The problem is wholly one of mathematics. As the value of the whole, (\$15,500,) is to the value of the salt meadow, (\$500,) so is the whole debt, (\$1,454.33,) to the fraction of the debt which is to be set to the salt meadow. That amount is \$46.91; and this is the amount which the defendants should be required to pay on redemp-

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tion, with interest from the date of the committee's report, December 15th, 1881. The rule here applied is a universal one, and will be found to work no wrong to the prior mortgagee even where the security is unequal to the debt, since the sum set to the particular part to be redeemed will be found in that case to be greater than the value of that part of the security.

The case of *Osborn v. Carr*, before referred to, has been cited by both parties as having a bearing upon the present case. That case was one of great complication and involved a discussion of some of the principles which we have applied in the present case, but the facts in the two cases have too little similarity to enable us to reason from one to the other.

We have spoken of the incumbrances on the property held by the defendants as amounting to \$90,000. This fact is found only in general terms in the report of the committee, and we have no means of knowing when the other mortgages constituting this incumbrance were given. The finding is in these words: "The premises of which the defendants obtained title by foreclosure, exclusive of the salt meadow, were worth, at the time they obtained title to them the sum of \$97,000, and the claims for which they held this property as security amounted to \$90,000." As the foreclosure was obtained in 1876, and the plaintiff had obtained his mortgage on the lots *A* and *B* only two years before, it is reasonable to suppose that this indebtedness had accrued and the security had been obtained upon it before he took that mortgage. At any rate in the absence of any direct finding on the subject we can not assume the contrary. It is perhaps, in the circumstances, a matter of no importance. If the Hubbard mortgage which the plaintiff would have to redeem is to be regarded as only \$11,600 instead of \$90,000, yet it is manifest that the lands, if redeemed from that mortgage, would still be subject to the rest of the \$90,000 incumbrance, making a final redemption of the whole property necessary.

There is error in the judgment complained of.

In this opinion the other judges concurred.

Pond *vs.* Cummins.

SUPREME COURT OF ERRORS.

HELD AT NEW HAVEN FOR THE COUNTY OF
NEW HAVEN,

ON THE FIRST TUESDAY OF DECEMBER, 1882.

Present,

PARK, C. J., CARPENTER, PARDEE AND GRANGER, Js.

JONATHAN W. POND *vs.* FRANK H. CUMMINS AND
ANOTHER.

Where a person carries on business as an agent or servant of another and is to receive a certain share of the profits merely as compensation for his services, he does not thereby become in law a partner.

Where an officer who has taken a receipt for property attached has ceased to be accountable for it to the attaching creditor, and is not accountable to the owner, he can not recover upon the receipt given for it.

SUIT on a bond given by the defendants for property attached; brought to the Court of Common Pleas and tried, on a general denial, before *Torrance, J.* The following facts were found by the court:—

On or about February 10th, 1881, the defendant Cummins applied to the defendant Bryan for assistance in money to enable him to start in business. Prior to that time Cummins and his brother, as co-partners, had been engaged in the saddlery and harness business in New Haven. They had failed in business, and in the early part of 1881, and prior to February 10th, 1881, made an assignment in insolvency. Cummins had been in business in New Haven for more than twenty years, near by the store of Bryan, and

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was on very friendly relations with him. At the time of this application Cummins was poor and had little or no property, and was dependent on his daily labor at his trade as a harness maker for support. The condition of his affairs was well known to Bryan, and the latter was willing to assist him, provided he could do so without interference from the then creditors of Cummins.

He ascertained how much it would take to start business in a small way and agreed with Cummins to advance \$700 for that purpose. The business was to be carried on by Cummins as the agent of Bryan. The time during which such agency was to continue was not fixed. Cummins was to rent a small store as agent of Bryan, and to stock the same with goods and material necessary in the saddlery and harness business, and was to work at his trade of harness maker in the shop and to make up goods in that line of business for sale. He was to keep books of account as such agent and to manage the entire business. He was to get nothing on credit, but was to pay cash for all things required by him in the business. The stock of goods and material to be purchased with the money so to be advanced was to be at all times kept full. Cummins was to have one-half of the net profits of the business, and the other half was to be paid over to Bryan. On the 10th of February, 1881, Bryan let Cummins have the \$700, and within a short time after Cummins, as his agent, hired a small store in New Haven and bought goods and material necessary for the carrying on of the saddlery and hardware business, and opened the store and commenced business therein as such agent about the 3d day of March, 1881. From that time until the 5th day of April, 1881, when the attachment hereinafter stated was made, the business was conducted in all respects according to the agreement between Bryan and Cummins.

There was no written agreement between them, and no written entry or memorandum thereof was at any time made. Bryan's name nowhere appeared on the books, but they were kept in the name of "F. H. Cummins, agent." No profit and loss account was kept. Cummins was a

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harness and saddle maker by trade, and during the time made up some of the material by him purchased with the money of Bryan into harnesses and other articles in that line of business. The labor also of men employed by him as agent went into the manufactured articles.

Some of the goods so made up by him were attached by the plaintiff on the 5th of April, 1881, and were received for by the defendants. It did not appear from the testimony what goods so attached were so made up, nor how much of Cummins's labor went into the goods.

No evidence was offered to show that any profits had been made in the business or divided between Cummins and Bryan.

The attachment of the goods was made in a suit in favor of one Matthewman, against the defendants and another, as the goods of Bryan or of Cummins. The defendants received to the plaintiff therefor.

In the suit in which the goods were attached judgment was rendered against Cummins and in favor of Bryan for his costs.

On the above facts the plaintiff claimed, and asked the court to rule, that the defendant Cummins had an interest in the goods which was subject to attachment for his debts, and that it was the duty of the receiptsmen to turn over the property to the plaintiff, that he might sell said interest on the execution, and that, not having done so, they were liable.

But the court ruled that the property belonged to Bryan, that Cummins had no interest in it, and that the receiptsmen were not bound to return it to the plaintiff; and rendered judgment for the defendants to recover their costs. The plaintiff appealed to this court.

T. H. Russell, with whom was *C. B. Matthewman*, for the plaintiff.

W. A. Wright, for the defendants.

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CARPENTER, J. This is an action by an officer on a receipt given for property attached. It was attached as the property of Cummins. The court found that it belonged to Bryan and rendered judgment for the defendants. The plaintiff appealed.

The claim is that Cummins had an interest in the property as a partner which was attachable. The claim is made upon the following facts:—Bryan furnished capital for carrying on the saddle and harness business. The business was to be carried on by Cummins, and in his name as agent for Bryan, and he was to receive one half of the profits. In about one month after the business commenced the property was attached. It is very clear that Cummins was not a partner. He furnished no part of the capital and owned no part of the stock in trade. He was not interested as a principal trader, his character was that of an agent or servant of Bryan, and the fair import of the finding is that he received one half of the profits, not as profits, but merely as compensation for his services as such servant or agent. It is elementary law that such an arrangement does not, either in law or in fact, constitute him a partner.

Another ground of error is, that the defendants, having agreed in writing to return the property, are bound to do so, and that their failure to do so is a breach of the contract for which the plaintiff may recover. But this court has held on several occasions that where the defence shows that an officer is not accountable for the property to the attaching creditor, nor to the owner, he cannot recover. *Clark v. Gaylord*, 24 Conn., 484; *Dayton v. Merritt*, 33 Conn., 184; *Pond v. Cooke*, 45 Conn., 126. It appearing in this case that the defendant Bryan is the sole owner of the property, there is a complete defence to the action.

There is no error.

In this opinion the other judges concurred.

Whittemore v. Smith.

FRANK H. WHITTEMORE v. CECIL L. SMITH.

Certain premises were leased in writing to *D* for one year with the privilege of five, the lease not being recorded. *D* elected to occupy for five years. During the second year the plaintiff purchased the premises, and repeatedly afterwards accepted from *D* the rent provided for by the lease. In a suit brought by the plaintiff before the expiration of the term for the possession of the premises, it was held that evidence was admissible against the plaintiff that he knew of the existence of the written lease and of its terms.

The act of 1882, (Session Laws, 1882, p. 145,) provides that whenever in a trial a ruling is made as to evidence objected to, a statement of the question if excluded, and of the question and answer if admitted, and of the ruling of the court, shall, if moved for, be forthwith made in writing and certified by the judge and become part of the record; and that unless such motion shall be made all objection to the ruling shall be considered as waived. Held, that the party against whom the ruling is made has a right to insist, unless in some very special case, that all proceedings shall be suspended until the written statement of the ruling has been made and certified by the judge.

CIVIL ACTION to recover possession of real estate, with rents and profits; brought to the City Court of the city of New Haven, and tried to the jury on the general issue before *Sheldon, J.* Verdict for the plaintiff, and appeal to this court by the defendant. The case is sufficiently stated in the opinion.

J. Twiss and E. P. Arvine, for the appellant.

S. R. Hull, with whom was *G. A. Tyler*, for the appellee.

GRANGER, J. The complaint demands possession of the premises described in it and two hundred dollars damages. The parties were at issue upon a general denial. The main question was, whether the defendant was wrongfully in possession of the premises. The plaintiff claimed to be the legal owner of the premises; the defendant claimed that he was in possession by virtue of a lease from the agent of the plaintiff to a Mrs. A. C. Downs, and that

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he was occupying the premises as her agent during her temporary absence; and the defendant, to show that he was lawfully in possession, offered a written lease of the premises for one year with the privilege of five years, purporting to have been executed by F. J. Whittemore, the father of the plaintiff, as agent for one Samuel Hamilton, a former owner of the premises, to Mrs. Downs. Afterwards, and during the second year of the lease, Mrs. Downs having elected to occupy under it for five years, Hamilton conveyed the premises to F. J. Whittemore, and soon after the latter conveyed them to the plaintiff. This evidence was accompanied with an offer of proof that the plaintiff, when he became owner of the premises, knew of the existence of the lease and its contents, and that F. J. Whittemore, after the sale of the premises to the plaintiff, continued to be the agent of the latter in the management of the premises in the same manner as he had been when Hamilton was owner; and that the fact of the existence and contents of the lease offered in evidence were communicated by F. J. Whittemore to the plaintiff at the time he took his title deed of the premises, and that with this knowledge the plaintiff had repeatedly accepted from Mrs. Downs the rent provided for by the lease. The lease had never been recorded. The present suit was brought before the term of five years had expired. The court rejected the lease and the offer of the defendant to bring the facts home to the plaintiff.

The plaintiff was a witness and testified that he was the owner of the premises and that he caused the notice set out in the finding to be served upon the defendant.

On cross-examination of the plaintiff, the defendant's counsel asked him the following questions:

1. "Do you know the nature of Mrs. Downs's occupancy of the premises described in the complaint?"
2. "Was it brought to your knowledge that Mrs. Downs was occupying these premises under a lease at the time of your purchase?"
3. "Do you know any of the conditions under which she occupied these premises?"

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The court excluded the lease and the foregoing questions. In doing so we think it committed an error, which should entitle the defendant to a new trial.

It matters not whether the father of the plaintiff was agent for Hamilton or for the plaintiff, or whether he had any authority from either of them to make a lease of the premises, if in point of fact he made a lease to Mrs. Downs professing to be either agent for Hamilton or agent for the plaintiff, and the plaintiff, knowing of the lease, accepted rent under it or did any other act from which a fair inference could be drawn that he ratified the lease. The actual authority to make the lease from F. J. Whittemore was of no consequence.

The questions propounded by the defendant tended to bring out the fact that the plaintiff knew of the existence and terms of the lease made by F. J. Whittemore, his father, to Mrs. Downs. They were clearly germane and legitimate and should have been admitted as well as the lease. If the defendant could have shown that the lease had been ratified, as he offered to do by the plaintiff, very clearly the plaintiff was not entitled to a verdict. This is an elementary principle and needs no citation of authority to support it.

As a new trial must be granted upon this ground, it becomes unnecessary to consider the other question made in the case, but as it is one of importance we will notice it.

In 1882 the legislature passed the following act (Session Laws of 1882, p. 145:) "Whenever in the trial of a cause objection is made to any evidence offered, and such evidence is received or rejected by the court, upon the motion of either party a statement of the evidence so received or rejected, including (if the objection be to a question) the question if excluded, or the question and answer if admitted, with the grounds of objection and the ruling of the court thereon, shall be forthwith reduced to writing and certified by the judge, and shall become part of the record in the cause; and unless such motion be so made all objection to such ruling shall be considered as waived." It

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appears from the record that the court excluded a certain paper offered in evidence by the defendant's counsel, and that the latter "both then and after the jury had retired, requested the court to certify to the ruling in reference to said paper and the defendant's exception thereto. But that the court did not so certify at that time."

The statute is clear, explicit, and susceptible of but one construction. The statement of the evidence and the ruling must be made "forthwith"—that is, immediately—without delay. The party against whom the ruling is made has a right under this statute to insist, unless perhaps in some very special case, that all proceedings shall be suspended until his objection has been reduced to writing. The object of the statute was to prevent any possible uncertainty as to the ruling. While it is not necessary for us to consider how far a neglect of this duty on the part of the court is fatal to the validity of a verdict in favor of the other party, we yet feel it our duty to express our clear conviction that the requirements of the statute are to be strictly complied with.

A new trial is advised.

In this opinion the other judges concurred.

EPHRAIM N. PECK AND WIFE *vs.* THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

The plaintiffs, husband and wife, sixty years old, drove in a top phaeton along a street that crossed a railroad track in the city of *M*, driving a dull horse. It was the early evening, when it was growing dark, and was the regular time for a train to leave the station, which was a short distance above this crossing, and to pass over the track at this place. They had lived for thirty years in *M* and were familiar with the locality. As they approached the crossing they heard the train arriving at the station, and the wife asked the husband, who was driving, to look out for the cars, and the engine with its headlight could easily have been seen if they had leaned forward and looked. Before they got upon the track

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the bell rang for the gates to be closed, and the gateman on the other side immediately began to swing his gate. The husband tried to stop the horse but was not able to do so, and the other gate, which was swung immediately after, caught in a wheel of the carriage as he was trying to drive through. The wife being alarmed jumped out and was hurt. The engineer did not start his engine until the carriage had got safely across, and if the wife had remained in the carriage she would not have been hurt. Held that the railroad company was not liable for the injury received by the wife. (Two judges dissenting.)
The plaintiffs were guilty of want of ordinary care in attempting to drive across when they knew, or could have seen by looking, that a train was about to pass.

| If the husband alone was guilty of actual negligence, his negligence would be imputed to the wife.

It made no difference that it was a highway, which was open to all the public. It was also the defendants' track, over which they had an equal right to pass with their trains.

It was the duty of the gatemen to close the gates immediately upon the signal being given. It was the duty of the plaintiffs to stop their horse before they got upon the track, and the gatemen had a right to presume that they would do so.

Nor was the engineer guilty of negligence. He gave the signal before the plaintiffs were on the track and did not start his train until they were out of the way.

TRESPASS ON THE CASE, for an injury to the wife through the negligence of the defendants; brought to the Court of Common Pleas. The defendants demurred to the declaration, and the demurrer was overruled and the case heard in damages. The following facts were found by the court:—

On the 18th day of April, 1878, the plaintiffs, being husband and wife, rode to a store on Colony street in the city of Meriden. Colony street is next west of Railroad Avenue. The carriage occupied by the plaintiffs was an ordinary low-top phaeton, the top being up at the time of the accident. They were a little over sixty years of age. Mrs. Peck left the carriage, went into a store, and as she came out the plaintiffs heard a train of cars moving over the defendants' road. It was then about half-past seven o'clock in the evening, and it was about the regular time for a train to leave the Meriden station to go to New Haven.

The plaintiffs had lived in Meriden about thirty years and a little more than one mile from the railroad station. Mrs. Peck got into the phaeton and they started to go home,

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passed a few rods down Colony street, and turned easterly into Main street. The plaintiffs had been in the habit for many years of driving over the tracks of the defendants in Main street. On this occasion Mr. Peck was driving. The horse was gentle, about eighteen years old, was generally used in team work, was somewhat heavy and stupid and not sensitive to the bit. It had belonged to Mr. Peck for some time. They drove easterly along Main street upon a slow trot, and were driving a few feet south of the centre line of the roadway. At this time the regular down express train was standing at the station, headed toward the crossing, and the headlight of the locomotive was lighted. The locomotive was about one hundred feet north of the centre of Main street, where it crosses the main track of the defendants' road. When within about two rods of the west side of the west main track, Mrs. Peck said to her husband, "Be sure there are no cars." He replied, "The gate is all right, we can go through; the gate-tender is leaning on his gate." She looked and saw the gate-tender at the south gate leaning on his gate and that the gates were then open for the public to pass. At any point in Main street for a distance of fifty feet west of the main track, it was possible for the plaintiffs to have seen the headlight of the locomotive, if they had bent forward and looked to the left of the top of the carriage; but there was no evidence to show that they did look or attempt to look in that direction.

The two gates at this crossing were at this time operated by employees of the defendants, who were constantly on duty to open and close them for the better protection of travelers having occasion to cross the railroad at this point. The gates had been used for several years prior to that time and the plaintiffs had knowledge of the defendants' opening and closing them. They were so constructed that when opened to public travel they were closed to the passage of the trains, being swung across their tracks on either side of the crossing. The south pole was about forty-seven feet long; the north pole about forty-eight and a half feet long. The gates were heavy, and in their construction heavy iron

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braces, running diagonally from the outer portions of the gates to the upright poles, were necessary. This construction rendered it impossible for the gates to be opened and closed simultaneously, and by a standing order of the company the south and east gate, to avoid confusion and accidents, was always closed first, and the north and west gate was not and could not be started from its position across the track until the south and east gate was practically across Main street, east of the track. The south and east gate was attached to an upright standard or pole located at the southeast corner of the crossing and was stretched toward the west when the crossing was opened to public travel. The north and west gate was attached to an upright standard at the northwest corner of the crossing. When the crossing was opened to the public, the ends of the gates were fastened respectively at the northeast and southwest corners.

When the plaintiffs had approached the west side of the main track, being then south of the centre of Main street, and while the head of the horse was something more than ten feet west of the west rail of the main track, the alarm bell for the closing of the gates had been struck by the engineer upon the locomotive, and the keeper of the southeast gate, in obedience to the alarm bell, swung that gate to close it upon the east side, and the end of the gate passed close in front of the horse of the plaintiffs. Mr. Peck pulled back the horse to stop him, but did not succeed and the horse continued across in the same general direction until his head was near the closed gate on the east side. At this point of time, the gate-keeper of the northwest gate had begun to move his gate to close it. The bell was ringing on the engine, though the train did not start. It was growing dark. There was some shouting and calling. Both plaintiffs heard some one call once or twice, "Get out of there," or "Get out of there, damn you," and they thought it came from the employees of the company; but it is not so found; there were several men standing near who were not employees of the company and they were looking at the confusion. At the same time the horse was substantially at a standstill,

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and the end of the northwest gate interlocked slightly against the left hind wheel of the plaintiffs' carriage, striking against the felloe so that the carriage could not be moved far in either direction. Thereupon Mrs. Peck looked up, saw the headlight of the engine, became alarmed and jumped out of the carriage. She struck with one foot upon one of the rails of the side track, broke her ankle and seriously injured the bones of her foot. Some men immediately came to her assistance and carried her into a store east of the track.

The phaeton was then lifted around from the rear so as to release the pole from the carriage wheel; the east gate was pushed further to the east, so that the horse and phaeton could pass out on the northeast side. The north and west gate was pushed on to its position across Main street, and the train then started from the station and passed down over the west main track. The horse and phaeton were safely across the tracks before the engine left the station. The carriage and horse and harness were not injured except that the varnish on one wheel was scratched by the gate. If Mrs. Peck had remained in the phaeton she would not have been injured. If there had been no gates the plaintiffs would have passed the crossing in safety.

The Main street at this point was over fifty feet wide and there was nothing but the gates as described and the tracks to prevent the horse and carriage from being turned around. There were no other vehicles and no temporary obstructions in the way. The gate-keeper of the southeast gate pushed his gate before him and did not know the plaintiffs were following him and his gate across the track. The gate-keeper of the northwest gate could see the plaintiffs and their carriage as he was pushing his gate. The bell of the engine was ringing its alarm until the accident took place. Mr. Peck supposed that he could get across safely by following the south and east gate, because he thought the gate-keeper would move his gate further east, as he subsequently did, and let him out on the northeast side.

No negligence is found in either of the plaintiffs or in the

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defendants, except such as may be inferred from the facts herein found. Mrs. Peck was seriously injured and confined to her bed for many months. If, upon the foregoing facts, the law is such that the plaintiffs are entitled to recover more than nominal damages, then the damages are found to be one thousand dollars; but if only nominal damages ought to be recovered, then the damages are assessed at fifty dollars.

The question, whether the plaintiffs were entitled to anything more than nominal damages, was reserved for the advice of this court.

T. E. Doolittle and *W. H. Law*, for the plaintiffs.

1. The finding leaves the question of negligence for the inference of this court. The court can find such negligence on the facts. And such a question has been repeatedly reserved for this court. *Knight v. Goodyear India Rubber Glove Co.*, 38 Conn., 440. See also *Dimock v. Town of Suffield*, 30 id., 129; *Strouse v. Whittlesey*, 41 id., 560; *Parker v. Union Woolen Co.*, 42 id., 399. And the burden of proof is on the defendants. *Crane v. Eastern Transportation Line*, 48 Conn., 361.

2. The right of the traveler to pass over and along this street is equal to that of the defendants to cross it. Shearm. & Red. on Neg., § 481, and authorities there cited; *Ernst v. Hudson River R. R. Co.*, 85 N. York, 9; *Beisiegel v. N. York Central R. R. Co.*, 84 id., 622. Mrs. Peck, in the exercise of her legal privilege, did not expose others to injury, and was charged with no duty of extraordinary care. The defendants exercised their privilege with agencies perilous to human life, and they were under a correlative obligation to use them with the highest degree of care. As the highway was never dangerous, except when they made it so, by driving their engines across it, and as they never crossed it without some degree of jeopardy to the wayfarer, the law has provided for the protection of the citizen, by requiring the defendants to give special warning whenever their engines approach an ordinary road crossing,

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by the blowing of a whistle and the ringing of a bell. Gen. Statutes, 320, § 13. And where the burden of travel is greater, then a special tribunal created by the legislature may order the defendant, in addition to the ordinary signals, to keep a man with a flag at the crossing, to warn the approaching traveler, and protect the public. And when the crossing is in a crowded street of a city, the same tribunal may order the defendants to erect and maintain, before the approach of a train, an impassable barrier against the traveler, so that by no possibility can a traveler get upon the crossing when a train is approaching. Gen. Stats., *supra*. This last was the duty which the statute and the statutory tribunal imposed upon the defendants. The defendants have violated this plain duty in the grossest manner. They have so closed their gates as not to *exclude* but to *include* the traveler at the point of intersection between the railway and the highway. They did not shut out the plaintiffs as they had the means to do, but they shut them in, when their duty was to shut them out. The office of the western gate is to bar out western travel, and the case finds that that gate was wide open and had not been moved when the plaintiffs drove across the track on the highway. When the defendants had failed to close the western gate in time to *exclude* them from the track, and had in fact imprisoned them on the track, what was then their duty? Clearly to open the doors of this prison in any direction to get them out of it. It was the duty of the eastern gate-keeper to open his gate and let them pass out; for his gate is to let people out passing to the east and shut out those passing to the west. And it was the duty of these two gate-keepers to shut their gates in such manner as to exclude travelers in ample time before the approach of a moving train. And when the eastern gate-keeper found the plaintiffs enclosed in the track, it was his duty to do that which he did after Mrs. Peck was hurt, namely, open the gate and let the team out, and long before the train passed. There was no reason why the east gate should not have been opened for this purpose. The case finds that there were no obstructions,

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and not a vehicle in the way. There was no office for that east gate to perform except to let the plaintiffs pass off the track. There was no traveler seeking to enter, and none to bar off from the track. Again, there was plenty of time for the defendants to remove the public from this place of intersection, for this case differs from any in the books, for the train was not even approaching, but was at rest, standing absolutely still. But the case finds that the man at the west gate flung around his gate, and fastened the plaintiffs on the track, by running the end of the gate into the hind wheel of the phaeton; and there was a cry, "Get out of that, — you," and Mrs. Peck looked up and saw the head-light, and knowing that the carriage was fastened, in her terror jumped out; and after she was taken up and carried to a store, and she and the horse and the phaeton had passed out of the east gate, then this train, which had been standing still and could not hurt anybody, started. The case finds that "if there had been no gates the plaintiffs would have passed the crossing in safety." Her injury can only be attributed to the grossest mismanagement of this contrivance, designed to protect the public, and which would, if properly operated, have been an absolute protection.

3. It was gross negligence to erect gates to be operated in this manner, so that a traveler could be shut in upon the track. It was their duty to construct gates that had a perpendicular and not a horizontal motion, such as they have now substituted, or if they had horizontal gates, to have had shorter gates and more men, so that they could be closed simultaneously.

4. When the keeper of the west gate saw that the plaintiffs had entered upon the track, it was his duty to tell the plaintiffs to turn around and pass back on the west side, so that he could close his gate. As the railroad company had so constructed their gates that only one gate could be closed at the same time, then it was their manifest duty to tell those persons who were on the track to turn around in front of the gate about to be closed, and have the track

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free to close the gate. Especially was this so when the engine and train was stationary and would not start till all obstructions were removed from the track. At least it was their duty to warn the traveler, and give him an opportunity to get off the track, and not to pin him to the track, and shout, "Get out, — you!"

5. Again, if the defendants used this wretched contrivance of two gates, one shutting after the other, it was the duty of the gate-keeper to close the gate with some regard to the rights and safety of the public traveller. The case finds that the gates were open inviting the public to pass, and suddenly this east gate-keeper, standing behind and leaning his head on the gate, without a word of warning or even looking up to see if he is about to swing the gate against a traveler, pushed his gate right around in front of this horse and never knew it was behind him. If this gate-keeper had waited a second (and there was no hurry, as the engine was still,) he would have pushed the gate around to its position behind the plaintiffs. They would have passed in safety, as they would have done if there had been no gates. This servant of the defendant should at least have looked up and warned an approaching traveler that he was about to shut the gates. The slightest warning would have stopped the plaintiffs if given in due season.

6. Mrs. Peck was guilty of no negligence. The case finds that she and her husband, both about sixty years old, were jogging along behind an old horse, and when within about two rods of the track, she said to him, "Be sure there are no cars!" He replied, "The gate is all right; we can go through; the gate-tender is leaning on his gate." The case finds that then she did just what she ought to have done, and looked precisely where she ought to have looked, namely, at the man stationed there by the defendants, whose duty it was to keep the public off the highway when its use was desired by the railroad company; "she looked and saw the gate-tender at the east gate, leaning on his gate, and that the gates were open for the public to pass." It was not her duty to look anywhere, because she had a

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right to rely on the fact that the statute had been complied with, and that the gates would be closed if there was any danger of an approaching train. She knew there could not be a train within eighty rods of the crossing, and if a train was standing still, no engineer would start his train and run her down. He could not, if he had the disposition, because she could pass before the train by any possibility could reach the crossing. *Beisiegel v. New York Central R. R. Co.*, 34 N. York, 622; *Ernst v. Hudson River R. R. Co.*, 35 id., 9, 26, 35; Shearm. & Red. on Neg., § 481. It is said by the defendants' counsel that it was the duty of the plaintiffs, at a distance of forty-nine feet from the track, to have looked out from the phaeton and up the track. It was not their duty; it was their duty, if they were under any obligation, to look at the gate-keeper, whom the company had placed there not only to warn them, but to fence them off the track. But suppose they had looked up the track at this distance from it, they would have seen a stationary train, which would have admonished them to hurry up, lest the train should start. The plaintiffs were not negligent in driving up to the track when they were invited by the open gate to cross; and without the slightest warning, the gate was suddenly swung around in front of the horse. This heavy horse could not stop his momentum and he went upon the track; and Mr. Peck had a right to suppose that the defendants' servants, after they had let him on the track, would not shut him in, but that he could pass out through the east gate, as the easiest way to get off the track, and as there was nothing in the way to prevent it; but the other gate-keeper, seeing (as the case finds) the horse and carriage, deliberately swings his pole into the hind wheel of the carriage, and having locked it so that it could not move, yells to them to get out, and Mrs. Peck looks up, and seeing the head-light of the locomotive, is frightened and jumps from the carriage to escape being crushed by the locomotive, and is injured. It is not for the defendants, having negligently placed her in this position of imminent peril, to say that she erred in judg-

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ment and jumped out when she ought not to have done so. *Buel v. N. York Central R. R. Co.*, 31 N. York, 314; *Coulter v. Am. Merchants Un. Express Co.*, 56 id., 585; *Twomley v. Central Park &c. R. R. Co.*, 69 id., 158; *Schultz v. Chicago & Nor. Western R. R. Co.*, 44 Wis., 638; Wharton on Neg., §§ 304, 377.

G. A. Fay, for the defendants.

1. The only question reserved for the advice of this court is, whether the plaintiffs are entitled upon the finding to anything more than nominal damages. As the record expressly sets forth that "no negligence is found in either of the plaintiffs or in the defendants, except such as may be inferred from the facts found," judgment should be entered for nominal damages only, as a matter of law, for this court can not infer negligence. *Shaw v. Boston & Wor. R. R. Co.*, 8 Gray, 80. "The existence of negligence or want of care present from their very nature a question not of law but of fact, depending upon the peculiar circumstances of each case; and such principal facts must be found before the court can take cognizance of it, and pronounce upon its legal effect." *Park v. O'Brien*, 23 Conn., 345, 347; *Beers v. Housatonic R. R. Co.*, 19 id., 570; *Williams v. Town of Clinton*, 28 id., 266; *Aldridge v. Great Western Railway*, 2 Eng. Railway and Canal Cases, 852. This court "will not upon evidence reported assume the responsibility of finding by inference therefrom a fact which the court below could not find." *Brady v. Barnes*, 42 Conn., 518.

2. To enable the plaintiffs to recover "anything more than nominal damages, they were bound to prove a series of facts; and hence the record must find: 1st, Negligence on the part of the defendants; 2d, That the injury to the plaintiffs occurred in consequence of that negligence; and 3d, That such injury was not caused in whole or in part by their own negligence. *Birge v. Gardner*, 19 Conn., 511; *Park v. O'Brien*, 23 id., 345; *Neal v. Gillett*, id., 444; *Fox v. Glastonbury*, 29 id., 209; *Blaker's Exr. v. N. Jersey*

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Midland R. R. Co., 80 N. Jer. Eq., 241; *Chicago & N. W. R. R. Co. v. Dimick*, 96 Ill., 42; *Marble v. Ross*, 124 Mass., 44; *Brown v. European & N. Am. R. R. Co.*, 58 Maine, 387.

3. The plaintiffs must show "directly or inferentially" that they "are free from contributory negligence." *Fox v. Glastonbury*, 29 Conn., 209; *Parker v. Union Woolen Co.*, 42 id., 402; *Hart v. Hudson River Bridge Co.*, 84 N. York, 62; *Riceman v. Havemeyer*, id., 647. The finding that before crossing the defendants' road "it was possible for the plaintiffs to have seen the head-light of the stationary locomotive, but that there was no evidence to show that they did look or attempted to look in that direction," is decisive against the plaintiffs. The plaintiffs' neglect to use their eyes was palpable negligence as a matter of law. *Butterfield v. Western R. R. Co.*, 10 Allen, 582; *Wilds v. Hudson River R. R. Co.*, 24 N. York, 480; *S. C.*, 29 id., 827; *Bellefontaine R. R. Co. v. Hunter*, 83 Ind., 385; *Palys v. Erie R. R. Co.*, 30 N. Jer. Eq., 604; *Penn. &c. R. R. Co. v. Rathgeby*, 32 Ohio St., 66; *McGrath v. N. York Central R. R. Co.*, 59 N. York, 471; *Artz v. Chicago, &c. R. R. Co.*, 34 Iowa, 158; *Chicago & Alton R. R. Co. v. Becker*, 84 Ill., 485; *Penn. R. R. Co. v. Righter*, 42 N. Jer. Law, 185; *Railroad Co. v. Houston*, 95 U. S. Reps., 697. The finding that "the gatekeeper was leaning on his gate" could not be construed into evidence of safety as a matter of law, and as a fact should have been heeded as a warning that the gatekeeper was about to close the gate. *McGrath v. N. York Central R. R. Co.*, 59 N. York, 471; *Phil. & Reading R. R. Co. v. Boyer*, 97 Penn. St., 102; *Penn. R. R. Co. v. Righter*, 42 N. Jer. Law, 186.

4. If the defendants are not entitled to a discharge as a "matter of law," yet the record fails to find sufficient facts to entitle the plaintiffs to recover more than nominal damages; because the burden of proof of showing negligence on the part of the defendants and due care on that of the plaintiffs as a fact is wholly upon the plaintiffs, and the finding is insufficient in failing to establish those facts as facts. *Fox v. Glastonbury*, 29 Conn., 209; *Wilds v. Hudson*

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River R. R. Co., 24 N. York, 434; *Adams v. Inhab. of Carlisle*, 21 Pick., 147; *Button v. Hudson River R. R.*, 18 N. York, 248; *Gahagan v. Boston & Lowell R. R. Co.*, 1 Allen, 190. If this court were to attempt an inquiry into the facts by aid of the record, it could arrive at no satisfactory result, as the finding is not sufficiently explicit. It is found that "the end of the northeast gate interlocked slightly against the left hind wheel," but the record is silent as to whose the fault was. If that of the plaintiffs, it would bar a recovery. If the defendants', then the inquiry arises, did the plaintiffs contribute? If through the fault of neither, "it must be borne by the suffering party as a providential visitation." If through the fault of both, the plaintiffs must bear it, as "the law cannot measure the degree of carelessness." *Shaw v. Boston & Wor. R. R. Co.*, 8 Gray, 79; *Neal v. Gillett*, 23 Conn., 443; *Strouse v. Whittlesey*, 41 id., 559.

5. Had the injuries to the plaintiffs been the result of direct violence on the part of the defendants, it is possible this court might consider the question of negligence, but being consequential it cannot, because the finding that Mrs. Peck "became alarmed and jumped out of the carriage," and that "had she remained in the phaeton she would not have been injured," involves the inquiry as to whether, as a fact, her own "rashness and imprudence" did not contribute to such injury. The defendants "are not to be responsible for rashness and imprudence of a passenger; it must appear that there existed a reasonable cause for alarm." *Jones v. Boyce*, 1 Stark., 498; *Lund v. Inhab. of Tyngsboro'*, 11 Cush., 565.

6. The question as to whether the negligence of the husband is imputable to the wife we think does not arise in this case in view of the finding. Should the court think otherwise, then the law is so that the negligence of the husband is to be imputed to the wife. *City of Joliet v. Seward*, 86 Ill., 402; *Prideaux v. City of Mineral Point*, 43 Wis., 513; *Otis v. Janesville*, 47 id., 422; *Lake Shore, &c. R. R. Co. v. Miller*, 25 Mich., 274.

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CULVER, J.*—The question reserved for the advice of this court is, whether upon the facts found the plaintiffs are entitled to anything more than nominal damages. If the plaintiffs were guilty of such negligence as essentially contributed to the injury, they certainly are not.

[The judge here states the facts.]

We think the facts show very clearly that the plaintiffs were guilty of such negligence as essentially contributed to the injury. They knew, or might have known, that a train was near, for they heard it only a moment before they arrived at the crossing. By bending forward and looking to the left of the carriage they could have seen the train standing at the station, for the head-light of the locomotive was lighted. When within about two rods of the crossing Mr. Peck was particularly cautioned by Mrs. Peck to be sure there were no cars. Ordinary prudence should have prompted both Mr. Peck and his wife to look and see whether a train was near.

We think the facts show culpable negligence on the part of both husband and wife. But if the husband alone was guilty of negligence, it is well settled that under such circumstances his negligence is to be imputed to his wife. *Carlisle et ux. v. Sheldon*, 38 Verm., 440; Shearman & Redfield on Negligence, § 46; and many more authorities which might be cited.

In *Butterfield v. Western R. R. Co.*, 10 Allen, 532, it was held that a traveler upon a highway which is crossed by a railroad on a level, who knows that he is near the crossing and yet does not look up to see if a train is coming, is guilty of such negligence that he cannot recover for an injury sustained from a collision. In that case it was stormy, and the traveling bad, but the court say that that did not excuse the man from using his sense of sight. CHAPMAN, J., speaking for the court, says: "By due

* Judge Culver, of the Superior Court, was called in to sit in this case, in the place of Judge Pardee, who was disqualified by interest. It was agreed by counsel that Judge Loomis, who was not present, should receive the briefs on both sides and join in the decision of the case.

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care, is meant reasonable care adapted to the circumstances of the case. The crossing of a place known to be so dangerous as a railroad track frequently is by reason of the passing trains, reasonably requires a high degree of watchfulness and attention. Before attempting to cross a man should make reasonable use of his sense of sight, as well as of hearing, in order to ascertain whether he will expose himself to collision."

In *Wilds v. Hudson River R. R. Co.*, 24 N. York, 430, the court say: "One driving in a highway across the railroad track is guilty of negligence fatal to an action if he does so without looking for a train which he would have seen, or listening for signals of its approach which he would have heard, in time to have avoided a collision. It is also such negligence in one knowing the position of the road and the frequent passage of trains, to approach a crossing at such speed as to be unable to stop his horse before getting upon the track. * * The danger may be there; the precaution is simple; to stop, to pause, is certainly safe. His time to do so is before he puts himself in 'the very road of casualty.' If he fails to do so it is of no consequence in the eye of the law whether he merely misjudges or is obstinately reckless. His act is not careful, and he ought to abide the consequences—not the company under or into whose train he saw fit to run—whether he did so in inexcusable ignorance or in the belief that he could run the gauntlet unharmed. Nor is the court to look about to find how he, after putting himself there, conducted; whether he then took the best means of escape, or in his confusion ran more hopelessly into the jaws of death. No degree of presence of mind, no want of presence of mind at that time, has anything to do with the case. *He should not be there by want of care.*"

It is said that the place where the accident occurred is a highway, and that the plaintiffs had a right to be there. Such a claim was answered by GOULD, J., in the same case, as follows:—"Certainly it is a highway, or he would have no right to be there at all, and he could not recover,

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no matter what might be the negligence of the company. Further, it is a part of a railroad track, and the train has a right to pass there. It is a place in which two easements have a common right; and it is the right of the public that both should be so enjoyed as not unnecessarily to interfere with or abridge the rights of either. A sound and reasonable view of cases of this description is of as much importance to the public as it is to railroad companies. Such corporations are to be treated precisely as any other party. No more stringent rule is to be applied to them than is applied to individuals; nor is any less stringent one. Every citizen of the state has a deep interest in the existence and the successful operation of such companies; they have need of those powerful means, the use of which is necessarily accompanied with danger. But as the public has the benefit of those means it is bound to incur its share of the danger. A mutual duty is enjoined, and a mutual liability results from a failure to perform that duty; and the party who fails in performing his own part thereof is in no condition to enforce the penalty of a breach on the other." The court further say:—"A railroad crossing is known to be a dangerous place, and the man who knowing it to be a railroad crossing approaches it, is careless unless he approaches it as if it were dangerous."

It is insisted by the plaintiffs' counsel that the gate-tenders were guilty of culpable negligence in closing the gates as they did; that they should have waited until the plaintiffs had crossed, notwithstanding their instructions to close them when the engineer gave the signal for closing them.

It is found that the gate-tender of the south gate did not know that the plaintiffs were following him and his gate. If he saw them at the time the bell was struck by the engineer he knew they were a considerable distance from the outer rail of the main track, and would naturally suppose they would heed the warning and stop. He was engaged in moving his ponderous gate, forty-seven feet long, with his back to the plaintiffs. Mr. Peck knew it was his duty to

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stop his horse and endeavored to do so, and doubtless would have succeeded but for its being so hard mouthed and dull.

It does not appear from the facts that the man at the north gate supposed, or had reason to suppose, that his gate would come in contact with the plaintiffs' carriage when he began to move it in obedience to the signal. That gate was forty-eight and a half feet long. For aught that appears, the slight interlocking and striking the felloes may have been, and probably was, occasioned by the horse being pulled round by Mr. Peck in his vain efforts to stop it.

I see no culpable negligence on the part of the gate-tenders. They were constantly on duty to open and close the gates for the better protection of travelers having occasion to cross. When the engineer struck his bell as a signal to close the gates, as he was about to start his train, it was their duty to obey instructions. If they may refuse to close the gates when the signal is given for that purpose, and wait for a team to pass over which happens to be within ten or twelve feet of the outer rail of the main track at the time the signal is given, a train might be delayed an indefinite time. In a city like Meriden a number of teams might be approaching from either side, and if one might pass why not the others, as each came up within the same distance? It is more reasonable that a team or a number of teams should wait a few moments than that a train of cars, with its mails and hundreds of passengers, should be detained.

Neither was the engineer guilty of culpable negligence. He was ready to start his train. If he saw the plaintiffs he too knew that they were a considerable distance from the outer rail, and had good reason to suppose that they would stop at the sound of the bell. He did not start his train however, but held it until Mr. Peck and his team were safely across.

If Mrs. Peck had remained in the carriage she would have passed safely across, as did her husband. She *misjudged*. She was in no real danger, and there was no more reason for her jumping out of the carriage than there was for her husband. She could see the locomotive, and might have

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known as well as her husband that the engineer would not start his train so long as the team was in danger of being struck by it.

The Court of Common Pleas is advised to render judgment in favor of the plaintiffs for the smaller sum, fifty dollars.

In this opinion PARK, C. J., and LOOMIS, J., concurred; CARPENTER and GRANGER, Js., dissented.

THE MERIDEN SAVINGS BANK vs. THE HOME MUTUAL FIRE INSURANCE COMPANY.

A policy of insurance on property mortgaged to a savings bank was, by a memorandum on the policy, made payable to the savings bank to the amount of its mortgage. A collateral agreement was also made by the insurance company with the savings bank, that all policies which had been or might be issued by the insurance company and assigned or made payable to the savings bank, should not, as to the interest of the latter, be invalidated by any act or neglect of the mortgagor or owner, that the savings bank should pay for any increase of hazard, and that on payment being made to the savings bank the insurance company should be entitled to all the securities held by the savings bank. Both the policy and the agreement were under seal. The premium, constituting the consideration of the policy, was paid by the insured. *Held:*

1. That the savings bank, not being a party to the policy, could not sue upon it alone, even though the promise was made for its benefit.
2. That the two instruments together constituted a contract between the insurance company and the savings bank, by which the latter became privy to the promise of the insurance company contained in the policy, to pay the loss to it; and that a suit at law could be maintained by the savings bank in its own name on that promise.

If the savings bank had sued in the name of the mortgagor, the suit would have had to be brought on the policy alone; in which case there would have been a difficulty in its availing itself of the agreement of the insurance company that the acts of the mortgagor should not invalidate the policy.

It would be no objection that, if the savings bank could sue in its own name upon the contract in connection with the policy, the insurance company might be subjected to two suits for the same loss. The company had voluntarily placed itself in this position by making two contracts with two different parties relative to the same subject matter.

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ASSUMPSIT against an insurance company on its contract to pay the loss upon a policy of fire insurance, to the plaintiffs; brought to the Superior Court. Demurrer by the defendants, and reservation upon the pleadings for the advice of this court. The case is sufficiently stated in the opinion.

The case was argued at a former term by *R. Hicks*, in support of the demurrer, and *O. H. Platt* and *J. P. Platt* contra. The judges having ordered a re-argument, it was argued at the present term by *R. Hicks* for the defendants, and *J. P. Platt* for the plaintiffs.

CARPENTER, J. This is an action on a fire insurance policy issued to the owner of the property, the loss being payable to the mortgagees, who bring the action in their own name. The declaration contains two counts. The first is on the policy alone, and is in the usual form, except that it is not brought by the insured. The second count recites the policy, and also a contract with the plaintiffs relating to the policy, known as a mortgage agreement. That agreement is as follows: "In consideration of one dollar received to its full satisfaction, the Home Mutual Fire Insurance Company, of Stafford Springs, doth hereby agree with the Meriden Savings Bank, of Meriden, Connecticut, that all policies of insurance which have been or may be issued by the said Home Mutual Fire Insurance Company, and which, with its consent, have been or may be assigned, or losses under which are made payable to the said Meriden Savings Bank, as mortgagee, shall not, as to the interest of the said mortgagee only therein, be invalidated by any act or neglect of the mortgagor or owner of the property insured, by any sale or alienation, by non-occupation or occupation of the premises for purposes more hazardous than are permitted by the policy. And it is further agreed between the parties hereto, that the mortgagee shall notify said company of any change of ownership or increase of hazard which shall come to its knowledge, and that every increase of hazard not permitted by the policy to the mort-

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gagor or owner shall be paid by the mortgagee on reasonable demand, according to the established scale of rates, for the use of such increased hazard during the current year. And it is further agreed between the parties hereto, that whenever the said Home Mutual Fire Insurance Company shall pay to the said mortgagee any sum for loss under any policy assigned as above, and shall claim that, as to the mortgagor or owner, no liability therefor existed, the said Home Mutual Fire Insurance Company shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt to the extent of such payment, or at their option may pay to the mortgagee the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and all other securities held as collateral to the mortgage debt; but no such subrogation shall impair the right of the mortgagee to recover the full amount of claim."

This contract was signed and sealed by the president and secretary of the insurance company. The declaration then avers a performance of all the conditions of the policy by the insured in the usual form.

The defendants demurred, and the case is reserved for the advice of this court. We will consider only the second count, as the plaintiffs claim nothing under the first.

The second count is not on the policy, which is a contract with the mortgagor, but is on the contract made with the plaintiffs. That the two instruments together constitute a contract with the plaintiffs is hardly denied. The controversy relates to its nature and validity.

The defendants claim that it is simply a waiver of certain conditions contained in the policy. The plaintiffs claim that it is an independent contract of insurance with them. We are inclined to take a somewhat different view of it from that taken by either of the parties. It is something more than a waiver. The policy contains a promise from the defendants upon a consideration moving from Guiott, the mortgagor, to pay to the plaintiffs, in case of loss, the

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amount of their mortgage. As the plaintiffs are not a party to the policy there is no privity (in respect to it alone) between them and the defendants; so that they could not sue on the policy alone, it being a sealed instrument, even though it may be that the promise was made for their benefit. *Woodbury Savings Bank v. Charter Oak Fire and Marine Ins. Co.*, 29 Conn., 374. But by another instrument under seal, referring to the policy, (and the two instruments must be construed together,) the defendants agree, in consideration of one dollar, and in further consideration that the plaintiffs are, in a certain contingency, to give notice to the defendants and are to pay extra premiums, and, in a certain other contingency, are to convey the mortgage debt, when paid by the defendants, and all securities held by them, to the defendants, to be held by them as a valid claim against the mortgagor, that certain enumerated acts by the mortgagor or owner of the property, which acts are prohibited by the policy, shall not, as to the interest of the mortgagees only, invalidate the policy.

Now the legal effect of this arrangement is to bring the mortgagees into contract relations with the insurers. The mortgagees thereby become privy to the promise to pay the loss to them, and thereby the obstacles to a maintenance of a suit by them on that promise—want of privity, and want of a consideration moving from them—are removed. *Hastings et al. v. Westchester Fire Ins. Co.*, 73 N. York, 141. We do not however, at this time and in this case, go quite so far as that case seems to go, and hold that the mortgage agreement is a distinct and independent contract of insurance. It is rather an agreement relating to an existing policy, by which certain conditions are dispensed with, and certain privileges are secured to the insurers which they would not otherwise have, and the plaintiffs are made a party to the contract of insurance.

The mortgage contract attached to this policy distinguishes this case from the *Woodbury Savings Bank v. Charter Oak Insurance Co.*, *supra*, and vests in the mortgagees a legal as well as an equitable interest in the promise to pay the mort-

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gagees contained in the policy. To describe the relations of the parties to each other more specifically, we should say there is but one policy and that runs to the mortgagor; he is the insured, the premiums were paid by him, the lien for assessments is on his property, he is personally liable for the assessments, and he is entitled to the remainder of the policy after the mortgagees are paid. The defendants agreed in case of loss to pay \$1,000. Of that sum, and as a part of it, they agreed to pay the amount of the plaintiffs' claim to the plaintiffs, and voluntarily placed the plaintiffs in a position to bring a suit on that promise in their own names.

But the defendants insist, notwithstanding the mortgage agreement, that no suit can be brought except in the name of the mortgagor. That claim mistakes the position of the parties. For all the purposes of this case we may concede that if a suit is to be brought on the policy alone it must be brought in the name of the mortgagor. But this suit is not brought on the policy; it is brought on a contract with the plaintiffs, of which contract the policy forms a part. On this contract no suit can be brought by the mortgagor because he is not a party to it, and it was not made for his benefit. If he should bring a suit on the policy it is very clear that he could not set up the agreement with the plaintiffs as an answer to any defence that might be set up, and for the reason that he is a stranger to that contract. If the plaintiffs should bring a suit in the name of the mortgagor that suit must be brought on the policy alone, because that is the only contract he has made; and in such a suit it is difficult to see how the plaintiffs could avail themselves of the mortgage agreement. Indeed we can hardly conceive how it is possible, in case any of the grounds of defence enumerated in the mortgage agreement are relied on, for the plaintiffs to avail themselves of that agreement except by bringing a suit in their own names as they have done.

But the defendants insist that this being a mutual company, it cannot insure the plaintiffs on terms differing from the terms on which policies issue to other members. The

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view we have taken of this case is not inconsistent with that position, therefore we have no occasion to controvert it.

For the same reason the defendants say that the company has no power to waive any of the conditions in the policy issued to Guiott and thereby place this policy on a different footing from the others. We have no occasion to consider that question now, for it does not arise on this demurrer. The declaration alleges "that the said John Guiott kept, observed, performed and fulfilled all the conditions, stipulations and things contained in said writing or policy of insurance on his part to be observed, fulfilled and kept." The demurrer admits that entire allegation to be true, so that, as the case stands before us, the company issued a policy to John Guiott, the building burned, whereby the loss became payable, the insured had observed all the conditions and stipulations of the policy, and the company has no defence. Now if the suit is properly brought in the name of the plaintiffs, as we think it is, no reason appears on the face of the declaration why the defendants should not pay the loss as agreed.

The defendants further say that if this suit may be maintained, they may be vexed and harassed by two suits on the same contract. We reply that the defendants have made two contracts with two different parties relating to the same subject matter. They have voluntarily placed themselves in a position in which they are subject to two suits. Should there be two suits they have no cause of complaint.

For these reasons we are of the opinion that the declaration is sufficient, and the Superior Court is so advised.

In this opinion the other judges concurred.

[**NOTE.** This case was heard some time after the regular term, when all the judges were present.]

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Bristol v. Atwater.

LOUIS H. BRISTOL, TRUSTEE, *vs.* CHARLES ATWATER
AND OTHERS.

A testator, leaving a large real and personal estate, made the following bequest:—"I give one fifth to my daughter *S*, the interest to be paid over to her semi-annually during her life; and in case of her death I give the same in fee simple to her children, if she leave any, but if none then to my other children or their issue in equal shares, the children or grandchildren to take the share which the deceased parent would take." *S* survived the testator and afterwards died leaving no issue. After the death of the testator and before that of *S*, *C*, a son of the testator, went into bankruptcy and the settlement of his bankrupt estate was not yet closed. Held—

1. That the contingent gift to the other children on the death of *S* without issue was good only as an executory devise.
2. That the interest of *C* vested only on the death of *S*.
3. That no interest passed to *C*'s assignees in bankruptcy.

The persons to take the contingent interest on the death of *S* without issue being the "other children of the testator or their issue," were not ascertainable until the death of *S*, and therefore the interest could not vest in them.

SUIT for the settlement of the construction of a will; brought to the Superior Court. The plaintiff was a trustee under the will.

The complaint alleged that the testator, Charles Atwater, Sen., of the city of New Haven, died in January, 1866, leaving a large estate, both real and personal, and a will, duly executed, by which, after making provision for his widow and giving certain legacies, he directed that the residue of his estate be divided into five equal shares, of which he gave one each to his two sons Charles, Jr., and Henry. The will then proceeded as follows:—

"*Fifth*: One other fifth part I give and devise to my said executors in trust for my daughter, Sarah Denman, the wife of Matthias B. Denman, as follows, namely: to pay over semi-annually to said Sarah during her natural life, for her sole and separate use, the income which may arise from that portion; provided that in case said Sarah should, in the judgment of said trustees, need any portion of the principal

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for her comfortable and proper support, said trustees may, from time to time, advance to her so much of the principal as may in their judgment be necessary therefor, and her separate receipt shall be sufficient discharge to said trustees for any payment made to her, whether of principal or interest; and in case of the death of said Sarah Denman, either before or after my decease, I give said fifth part to the children of said Sarah in fee simple if she leave any surviving her, to be equally divided among them; but if she leave no children, then to my other children or their issue in equal shares, the children of such as are deceased, whether of children or grandchildren, to take the share which their deceased parent would have had." *

The executors and trustees named in the will were Charles and Henry Atwater, sons of the testator, and Henry White. The executors had settled the estate in probate and the property was now held wholly under the trust. Louis H. Bristol, the plaintiff, had by the death or resignation of the original trustees, become, by appointment of the probate court, the sole trustee. Charles Atwater, Jr., on resigning his trusteeship in 1879, failed to pay over to Mr. White, then his co-trustee, a portion of the trust fund that had been in his hands, and remains indebted to the estate for the same, except as paid in part as below stated.

Charles Atwater, Jr., went into bankruptcy, under the bankrupt act of the United States, in 1877, and the plaintiff and Hobart B. Bigelow were appointed his assignees in bankruptcy. The schedules filed in bankruptcy made no mention of any interest existing in him under the will of his father. The claim of the trust estate against him as trustee was proved against his bankrupt estate and a dividend of \$3,280.31 was paid by the latter estate to the trust

* The will then gives another fifth to the testator's daughter Lucy R. Elmes, and the remaining fifth to his daughter Elizabeth Charnley. The advice of the court was asked and is given as to certain questions with regard to these legacies, but as they are not discussed in the opinion and are of no general interest, the reporter has thought it best not to occupy the space with a statement of them.

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fund. At the time of the bringing of the present suit Charles Atwater, Jr., was hopelessly insolvent, and there was a balance due from him to the trust fund of \$12,856.25.

The plaintiff as trustee now held in his hands \$43,500 applicable to the uses and trusts created by the fifth section of the will.

Sarah Denman died in May, 1882, leaving no children or lineal descendants. There survived her, her brother Charles Atwater, Jr., her sister Lucy R. Elmes, five children and a child of a deceased child of her sister Elizabeth Charnley deceased, and five children of her brother Henry Atwater.

The questions as to which the plaintiff sought the advice of the court were the following:—

1. Whether Charles Atwater, Jr., is entitled to any portion of the trust fund created by the fifth section of the will, and if so, to what share thereof.

2. Whether the plaintiff and the said Bigelow, as trustees in bankruptcy, are entitled to any portion of that trust fund, and if so, to what share thereof.

3. Whether the sum of \$12,856.25, due from Charles Atwater, Jr., is to be set off equitably or otherwise as against that share of the fund to which he would have been entitled, if not bankrupt, if it shall be held that his trustees in bankruptcy are otherwise entitled to receive that share.

4. To whom such portion of the fund as shall be found by the court to be equitably due to Lucy R. Elmes is to be conveyed.

5. To whom such portion of the fund as shall be found by the court to be equitably due to the children of Elizabeth Charnley is to be conveyed.

The allegations of the complaint were found true and the case was reserved for the advice of this court.

L. H. Bristol, for the plaintiff.

C. R. Ingersoll, for the assignees in bankruptcy of Charles Atwater.

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S. E. Baldwin, for Charles Atwater.

J. S. Beach, for the children and grandchildren of Elizabeth Charnley.

W. B. Wooster, for Lucy R. Elmes and heirs of Henry Atwater.

PARK, C. J. The first question presented in this case for our consideration and advice is, "whether Charles Atwater, Jr., is entitled to any portion of the trust fund created by the fifth section of the will of Charles Atwater, and if so, to what share thereof?"

The fifth section of the will is as follows: "One other fifth part I give and devise to my executors in trust for my daughter, Sarah Denman, as follows, namely: to pay over semi-annually to said Sarah during her natural life, for her sole and separate use, the income which may arise from that portion; provided, if said Sarah should, in the judgment of said trustees, need any portion of the principal for her comfortable and proper support, said trustees may from time to time advance to her so much of the principal as may in their judgment be necessary therefor, and her separate receipt shall be sufficient discharge to said trustees for any payment made to her, whether of principal or interest; and in case of the death of said Sarah Denman, either before or after my decease, I give said fifth part to the children of said Sarah in fee simple, if she leaves any surviving her, to be equally divided among them; but if she leaves no children, then to my other children, or their issue, in equal shares, the children of such as are deceased, whether of children or grandchildren, to take the share which their deceased parent would have had."

Mrs. Denman died in the month of May, 1882, leaving no children or lineal descendants.

In the month of April, 1877, Charles Atwater, Jr., was duly adjudged a bankrupt under the laws of the United States, and assignees of his estate were duly appointed,

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whose schedules in bankruptcy made no mention of any interest existing in him under the will in question. The bankrupt estate is now in process of settlement.

The testator died in the month of January, 1866, seized and possessed of a large estate in real and personal property.

These are the principal facts regarding the first question presented for our consideration.

We think it is clear that the contingent interest over to the other children of the testator or their issue, in the event of the death of Mrs. Denman without children surviving her, is good only as an executory devise. This is made certain by a long list of authorities that might be cited. We will refer to but a few of them. *Morgan v. Morgan*, 5 Day, 517; *Couch v. Gorham*, 1 Conn., 36; *Alfred v. Marks*, 49 id., 473; 4 Kent's Com., 268. "A proper executory devise is where a testator devises a fee, but upon the happening of a particular event limits the inheritance over to another description of heirs. Such a limitation over can not take effect as a contingent remainder, because a fee cannot be limited after a fee." 1 Swift Dig., 145. A testator devised his estate to his daughter and her heirs and assigns forever, and if she died without issue living at the time of her death, then to T. B. and his heirs. It was held, that the whole fee being given to the daughter and her heirs, no further remainder over could be limited upon that fee, and therefore the estate given to T. B. was a new fee limited upon a contingency as an executory devise. *Barnfield v. Welton*, 2 Bos. & Pul., 324. Bouvier, in his Law Dictionary, under the head of Executory Devise says: "An executory devise differs from a remainder in three very material respects. * * By it a fee simple or other less estate may be limited after a fee." The same principle is stated by Kent in the fourth volume of his Commentaries, 269, and by Blackstone in the second volume of his Commentaries, 172.

The will in question, in the first place, gives the fee simple to the children of Mrs. Denman if she should leave

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any surviving her; but in case she leaves no surviving children, then the fee simple is given to the other children of the testator, or their issue, as the case may be in regard to survivorship. Manifestly, a fee is here limited after a fee, which, according to the authorities, cannot be done otherwise than by executory devise. Blackstone (2 Com., 172,) says: "An executory devise of lands is such a disposition of them by will that thereby no estate vests at the death of the devisor, but only on some future contingency." Swift (1 Dig., 144,) says: "Executory devises may be defined to be such a disposition of lands in a will, that no estate vests at the death of the testator, but on some future contingency." Bouvier (Law Dict., *Ex. Devise.*) says: "By the executory devise no estate vests at the death of the devisor or testator, but only on the future contingency." In the case of *Inglis v. Trustees of the Sailors' Snug Harbor*, 3 Pet., 99, the court say: "A valid executory devise is such a disposition of lands that thereby no estate vests at the death of the devisor, but only on some future contingency."

It follows, therefore, that no estate vested in the other children of the testator or their issue until the happening of the contingency, to wit, the death of Mrs. Denman without children surviving her. And indeed the very terms of the will itself make it clear that no estate could vest before the happening of that event, for until the death of Mrs. Denman without children surviving her it was altogether uncertain where the contingent interest would be carried by the will. If Charles Atwater had had children and grandchildren during the life of Mrs. Denman, no one could tell which of the three generations would take under the will upon the happening of the contingency limiting the estate to some one of them. Charles Atwater's chances, perhaps, might be regarded as better than those of the others, for he stood first in the order of beneficiaries named in the will. If he survived the contingency, he would take. If he did not, but had children who survived, they would take; and so in respect to the grandchildren. Hence the terms of the

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will carry the estate along to the death of Mrs. Denman, without children surviving her, in order to ascertain where the contingent interest will then vest.

Again, suppose that Mrs. Denman had had a son grown to manhood during her life, and during her life he had been put into bankruptcy under the United States bankrupt act. Clearly his assignee in bankruptcy would have taken his interest in the estate. Suppose that during the same time Charles Atwater had had a son grown to manhood who likewise had been put into bankruptcy at the same time that his father became bankrupt, would his assignee have taken an interest in the estate? It is said that his father's assignee took such interest, and if so why would not the son's assignee have taken the same interest? He was but one step farther removed in the order of beneficiaries, and hardly that, for, being younger, there was more probability of his surviving the death of Mrs. Denman without children than there was that his father would so survive. At all events, if his father's assignee took an interest in the estate, no good reason could be given why his assignee would not have taken the same interest; and there would exist the strange anomaly of the same interest being taken by three different assignees in bankruptcy on three different estates.

Again, if the contingent interest vested in Charles Atwater on the death of the testator, it was the subject of inheritance, and it would make no difference whether Charles Atwater should die before or after the death of Mrs. Denman without children; whereas the will expressly provides that the contingent interest shall go directly to the children or grandchildren of Charles Atwater, as the case may be, in the event of his dying before the death of Mrs. Denman without children surviving her. This would seem decisive of the question. By the terms of the will the children of deceased children of the testator take nothing by inheritance of their deceased parent. If they take at all they must take directly from the testator through his will.

The case has been argued by the trustees in bankruptcy

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as though the will provided that in case Mrs. Denman should die leaving no children, the estate was then to go "to my other children," which would present a very different question from the one at bar. In that case the persons to take would be certain, and the event only uncertain. But here there is uncertainty both as to the persons to take and the event to happen.

The cases in Massachusetts have been relied upon by the trustees in bankruptcy in support of their views of the case. But it will be found upon an examination of the cases that none of them conflict with the views here expressed, except that of *Dunn v. Sargent*, 101 Mass., 336. In that case the will was similar to the one in question. It is a singular fact in the case that neither the construction of the will nor the rights of the parties under it were at all involved in the decision of the case before the court; but still the learned court, in a brief way, gave a construction to the will. They hold that parties, standing in the relation of "my other children" in the case at bar, had, during the life of the life tenant, "a vested interest in a contingent remainder." But this result was reached by holding that the persons to take were certain on the death of the testatrix. They say:—"The persons to whom these interests were bequeathed were ascertained at the death of the testatrix; for they were her own children and named in the will."

We think the persons who should take the contingent interest in the case at bar were not ascertained or ascertainable on the death of the testator, but only on the happening of the contingency. The phrase, "the children of such as are deceased, whether of children or grandchildren, to take the share which their deceased parents would have had," has reference to the death of Mrs Denman without children surviving her.

We think, therefore, that no estate vested in Charles Atwater, Jr., before the death of Mrs. Denman, and that consequently no estate passed to his assignees in bankruptcy by the bankrupt proceedings.

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We therefore answer the first question presented for our consideration, by saying that Charles Atwater, Jr., is entitled to one fourth part of the trust fund created by the fifth section of the will of Charles Atwater, from which a proper deduction should be made for his indebtedness to the fund.

We answer the second question by saying that the plaintiff and Mr. Bigelow, as trustees in bankruptcy, are not entitled to any portion of the trust fund.

The fourth question we answer by saying, that Lucy R. Elmes's portion of the fund should be paid to her trustee in trust for her.

And the fifth question by saying that the portion of the trust fund which belongs to the children of Elizabeth Charnley, deceased, should be paid to their trustee in trust for them.

We advise the Superior Court to render judgment in accordance with these views.

In this opinion the other judges concurred.

State v. Ryan.

SUPREME COURT OF ERRORS.

HELD AT HARTFORD, FOR THE COUNTIES OF
HARTFORD, WINDHAM, MIDDLESEX,
LITCHFIELD AND TOLLAND,

ON THE SECOND TUESDAY OF JANUARY, 1883.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, Js.

THE STATE *vs.* MATTHEW RYAN.

Under the statute (Gen. Statutes, p. 522, sec. 60,) which forbids the keeping open on Sunday of any place in which it is reputed that intoxicating liquors are kept for sale, an entire hotel may come within the statute as having such a reputation, although liquor may not have been sold in every room in it.

Whether the reputation applies to the whole hotel or to a certain part of it is wholly a question of fact for the jury.

If it applies to the whole house, the occupant may yet keep it open on Sundays for the admission of boarders and travelers.

COMPLAINT for keeping open on Sunday a house in which it was reputed that intoxicating liquors were sold; brought before a justice of the peace and appealed by the defendant to the Superior Court in Windham County. Tried to the jury before *Martin, J.* Verdict guilty, and motion for a new trial by the defendant. The case is sufficiently stated in the opinion.

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T. E. Graves, in support of the motion.

J. J. Penrose, State's Attorney, contra.

LOOMIS, J. The defendant was complained of for keeping open during the prohibited hours of a certain Sunday, a certain house reputed to be a place where intoxicating liquors were sold.

It appears from the motion that the place referred to was a hotel kept by the defendant, having two front rooms, one a bar-room and the other a sitting-room, each with its own outside door, but both opening through inner doors into a common hall between them, and the principal outside door and entrance to the hotel was into this common hall.

The State offered evidence to prove the keeping open of the house on the alleged day and the entry and exit of large numbers of people, residents of the village and vicinity; also evidence was offered tending to prove the reputation as alleged, and that it was not confined to the bar-room, but attached to the whole house occupied by the defendant.

The defendant on his part offered evidence to prove that every Saturday night, both before and after the date alleged, at about half past ten, he locked the front and inside doors of his bar-room and closed the blinds, and kept the room so closed till Monday morning, and that it was closed at the time alleged. The State then in rebuttal offered evidence to prove that the defendant did not keep his bar-room closed as claimed by him, but that he did sometimes keep it open on Sundays and sell liquors therein, notwithstanding his claim and testimony to the contrary.

The motion for a new trial is predicated wholly on the refusal of the court to charge the jury as requested. The substance of the request, given at greater length in the motion, was correctly condensed in the brief of the defendant's counsel to these two points:—That the court should charge the jury—1st, that the reputation which the witnesses applied to the whole house was disproved, and rested on the bar-room alone; and 2d, that if the bar-room was closed the

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defendant had a right, so far as the present charges were concerned, to keep open his house as if no bar-room existed on his premises.

The first request involved a pure question of fact and the court could not have complied with it without a clear usurpation of the province of the jury. It was for them to say whether witnesses were mistaken or false and whether the testimony as to what the reputation applied to had been disproved. The court gave the defendant the full benefit of this point before the jury, by instructing them that if they "should find that such reputation existed in connection with the defendant's house it would then be their duty to inquire and ascertain whether it applied and attached to the whole house, as claimed by the State, or only to the bar-room, as claimed by the defendant; and that if they should find from the evidence that the reputation attached only to the bar-room, and the defendant kept that room closed during the time mentioned in the complaint, then the defendant would be entitled to an acquittal."

Had this been a case where there was no testimony at all to be considered by the jury, an interference on the part of the court would have been justifiable; but here was a very different case. It would seem that all the evidence except what the defendant furnished attached the bad repute to the entire house, without distinction as to parts or different rooms.

The defendant instead of avoiding the effect of this evidence for the State, by showing that the reputation had no good foundation, as it was his privilege to do under the authority of *State v. Morgan*, 40 Conn., 46, seems by his course of defence virtually to have admitted the sale of intoxicating liquors on secular days, and that the reputation was well founded as to the bar-room in his hotel. This would seem to make a pretty complete case for the State on this point; for where it is alleged and proved that a hotel or house kept by a defendant is reputed to be a place where intoxicating liquors are kept for sale, and actual sales should be either proved or admitted, it would afford ample founda-

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tion for the reputation of the entire hotel or house. For this purpose it would seem absurd to require that liquor should be sold in every room. The ill-repute may properly diffuse itself over the entire house, if under one occupancy and control, though founded on acts done in a corner of one room in it.

And this brings us to say, by way of criticism, that the most appropriate application of the defence involved in the facts relied upon would have been, not to the matter of localizing the reputation and limiting it to the bar-room, but to the question whether the hotel on this occasion was kept open by the defendant for the lawful object of admitting his guests as such, or for the unlawful purpose as well of selling intoxicating liquors.

The defendant properly offered evidence tending to show that his bar-room was always closed as early as half past ten Saturday night and so remained until Monday morning, and that the fact was so on this occasion, and that the people he received were strictly his boarders and guests. If he had succeeded in convincing the jury that his claim was true, the court distinctly told them he should be acquitted. So that in fact he had the benefit of all the facts he relied upon in this more appropriate application, as well as under the head of reputation.

As to the other request, relative to the right of the defendant to keep his hotel open as such if the bar was closed, the charge was correct and substantially as requested, and was as follows:—"But if the reputation charged in the complaint attached to and embraced not the bar-room merely, but the whole house, then it was the duty of the defendant to close his house, except so far as it might be necessary to keep it open for the accommodation of his family, his boarders and travelers, guests of the house; and that the defendant had a right to keep his house open for the accommodation of these several classes of persons, even if it had the reputation claimed by the State and alleged in the complaint."

A new trial is not advised.

In this opinion the other judges concurred.

State v. Moriarty.

THE STATE *vs.* MICHAEL MORIARTY.

Under the statute (Gen. Statutes, p. 520, sec. 43), which makes it an offense to keep a place in which it is reputed that intoxicating liquors are kept for sale, such reputation is not conclusive evidence of the guilt of the accused, but he may show by proper evidence that he did not in fact keep liquors for sale, and that the reputation is not well founded.

The statute in one section forbids the keeping of intoxicating liquors for sale, and in another the keeping a place in which it is reputed that intoxicating liquors are kept for sale. These two offenses are so far distinct that an acquittal of the former is not a bar to a conviction of the latter, although the times at which the offenses are charged to have been committed are the same.

In a prosecution for the former offense the whole burden of proof is on the state, while in one for the latter the burden of proof, after reputation is shown, is shifted upon the accused. An acquittal in the former case may result from an insufficiency of proof on the part of the state, while upon the same facts a conviction in the latter case may result from an insufficiency of proof on the part of the accused.

Where the accused had kept the same place continuously for a year, and was charged with keeping a place in which it was reputed that intoxicating liquors were kept for sale on a certain day, it was held that evidence was admissible that liquors were actually kept by him exposed for sale at a time three months later, but within his continued occupancy of the place.

Such evidence would be of constantly diminishing weight with the lapse of time, but would be admissible, under instructions of the court as to the considerations affecting its weight.

It being a question of the intent with which the liquors were kept, and intent being generally a matter of continuance, the existence of the intent at the former time might be inferred, more or less strongly, from its existence later.

COMPLAINT for keeping a house in which it was reputed that intoxicating liquors were kept for sale, and in a second count for keeping intoxicating liquors for sale, without a license, on the 10th day of March, 1882; brought before a justice of the peace. The justice found the accused guilty on the first count and not guilty on the second. The accused appealed from the judgment on the first count to the Superior Court in Windham county, where the case was tried to the jury before *Stoddard, J.* Upon the trial the accused asked the court to charge the jury that the acquit

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tal upon the second count was conclusive in his favor upon the question of his guilt upon the first count. The court did not so charge; and the jury having returned a verdict of guilty, the accused appealed to this court on the ground of the error in the charge, and of an error in the ruling of the court as to evidence, which is fully stated in the opinion.

T. E. Graves, for the appellant.

J. J. Penrose, State's Attorney, *contra*.

PARK, C. J. The defendant was on trial before the jury for keeping a place reputed to be a place where intoxicating liquors were kept for sale, without having a license therefor. On the trial he offered in evidence the record of a justice court acquitting him of the charge of keeping intoxicating liquors for the purpose of selling them, without a license; the latter charge covering the same time with that on which he was then on trial before the jury. The evidence was admitted, and the counsel for the defendant requested the court to charge the jury that it was conclusive in the defendant's favor, as showing that the reputation of the place, as one where intoxicating liquors were kept for sale, had no foundation in fact. The court refused so to charge, and the question now before us is, whether this was error.

This court has of course nothing to do with the probabilities of the case. The sole question for us is whether the acquittal in the former case and the conviction in the present can stand together as a matter of law. In other words, does the acquittal in that case exclude the possibility, as a matter of law, of a conviction in this.

The statute upon which the present complaint is founded was fully considered by this court in the cases of *State v. Morgan*, 40 Conn., 44, and *State v. Thomas*, 47 id., 546. The statute was there interpreted as meaning a reputation founded in fact, and as therefore equivalent to proof of the

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fact that liquors were kept for sale, the proof of the reputation being merely *prima facie* proof that it was well founded, leaving the defendant the right to prove, if he should be able, that liquors were not in fact kept by him for sale. In thus throwing the burden of proof of his innocence upon the defendant, after proof of the reputation, the statute was introducing no new or unreasonable rule into the criminal law. There are many cases where *prima facie* proof of guilt on the part of the state is held to be sufficient for a conviction, if the defendant does not explain away the *prima facie* case against him. Thus where stolen property is found immediately after the theft in the possession of a person, it is sufficient proof that he is the thief, unless he shall explain his possession and show it to be innocent. Of course the charge may be in fact groundless, but if it is so it is almost always easy for the defendant to show it. He can in almost every case prove without difficulty where he got the property, and that it came to him honestly. There can hardly be conceived a case where this shifting of the proof upon the defendant is less likely than in a case like the present, to do him an injustice. It is, in the first place, hardly possible for a place to get an established reputation as one where liquors are kept for sale, when in fact they are not so kept. The indications are always too numerous and positive to allow of any mistake. In the next place, if no liquors are in fact kept in the place for sale, the defendant can establish the fact with no difficulty. The members of his family, if the place be a dwelling house or annexed to one, and his clerk, if it be a store, and persons occasionally at the place, whatever it may be, can all testify to the actual character of the place. The possibility of injustice is so small as not to be worthy of consideration. It is to be noticed that an acquittal upon the charge of keeping liquors for sale, does not prove that the defendant did not keep them for sale. Many a guilty man has been acquitted. He is merely protected from further prosecution upon the same charge. This alone would show that the acquittal could not bar the prosecu-

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tion for keeping a house reputed to be a place where liquors were kept for sale, for it would not be a charge of the same crime.

A charge therefore of keeping a place reputed to be a place where liquors are kept for sale, and a charge of keeping liquors for sale in fact, stand, both in logic and in law, upon entirely different evidence. In the first case the charge is sustained by proof of reputation, unless the defendant proves the actual fact to be otherwise. In the latter, the charge can be sustained only by proof of the actual fact. It might thus happen that a charge of reputation would be fully sustained and, the defendant offering no evidence, he would be convicted, and at the same time the state might fail to prove the actual fact, making an acquittal of the defendant necessary, even if he had offered no evidence in his own favor. It is decisive of the present case that the two cases, of conviction in the one upon reputation, and acquittal in the other upon the actual fact, can stand together, with no legal conflict or inconsistency.

A further question is made with regard to the admissibility of evidence. The state offered evidence to prove, and the court finds that it was proved, that the defendant kept the place in question continuously from about the 1st of August, 1881, down to and after July, 1882. The complaint charged the keeping of a house where it was reputed that liquors were kept for sale, as being on the 10th day of March, 1882, and the state offered evidence that the house bore that reputation on that day. It was open to the defendant to show that he did not in fact at that time keep liquors with any such intent to sell, and thus to show that the reputation had no foundation in fact and was really a false one. This made the question of the actual fact a pertinent one. On this question the state, having before proved the continuous keeping of the place by the defendant till the July following the time charged, offered evidence to prove that the defendant actually had a supply of liquors on hand as if for sale in June of the same year. This was three months after the time charged and to which the state was directing its proof.

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The defendant's counsel objected to the admission of this evidence on the ground that the fact that the defendant then kept liquors for sale did not tend to prove that he kept liquors to sell at a prior time, and especially at a time so long before, as he might have purchased them in the meantime, or if he had had them three months before, might not have kept them with an intention to sell them. It is obvious that such evidence would not be decisive, and of course would have far less weight with the lapse of time. It would not, however, be inadmissible. The jury would of course, under the advice of the court, consider the lapse of time and all the possibilities in the defendant's favor, and would not be likely to give any undue weight to the evidence. If the possession of the liquors with an apparent intent to sell them, the next day after the main fact charged, would have been admissible against the defendant, it is difficult to see what difference it can make, except in the weight of the evidence, if the possession of the liquors had been a week later or a month, or even three months, especially in connection with proof that the defendant had kept the place uninterruptedly during all the intervening time. It is to be observed that the point to be proved, in support of the reputation of the place, was an actual intent to sell the liquors that were kept. This matter of intent is not one of change from day to day, but one of continuance, and generally for a considerable time precedes the procurement of the liquors. The fact, therefore, that one who has kept a place for a year has a stock of liquors on hand at the place as if for sale, creates a probability, more or less strong, that the intent then existing existed three months before.

There is no error in the rulings of the court.

In this opinion the other judges concurred.

Bennett *vs.* Agricultural Insurance Co.

BENJAMIN F. BENNETT *vs.* THE AGRICULTURAL INSURANCE COMPANY.

A policy of insurance upon a dwelling-house contained a provision that "if the dwelling-house hereby insured shall cease to be occupied as such, then this policy shall cease and be of no more effect." The house was described in the application as occupied by a tenant, and was so occupied at the time of the insurance. The tenant left the house, taking with him all his furniture, about six o'clock on a certain evening, and the house was destroyed by fire about two o'clock the next morning. Held that the non-occupation avoided the policy.

The policy provided that all statements in the application should be "taken to be warranties on the part of the assured." The application contained the following questions and answers: "Q. How many acres of land in the place?" Ans. "Sixty." Q. "What is the value of the land and buildings?" Ans. "Seventeen hundred dollars." Held, that the parties had made these matters material and that they must be so regarded whether they related to the risk or not; and that if the answers were not true in the sense in which they were taken by the parties, there could be no recovery.

ACTION on a policy of fire insurance; brought to the Superior Court in Windham County, and tried to the jury before *Andrews, J.*

Upon the trial the plaintiff offered in evidence the policy of insurance dated June 14th, 1879, by which the defendants insured the dwelling-house of the plaintiff for two years in the sum of \$500. The policy referred to the application as "forming a part of this policy." The application stated the value of the house to be \$800, and contained the following questions and answers: Q. "How many acres of land in the place?" Ans. "Sixty." Q. "What is the value of the land and buildings?" Ans. "Seventeen hundred dollars." Q. "For what is the house occupied?" Ans. "Dwelling." Q. "By whom?" Ans. "Tenant."

The policy contained the following provisions:

"All statements contained in the application will be taken and deemed to be warranties on the part of the assured."

"If any dwelling-house hereby insured shall cease to be

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occupied as such, * * this policy shall cease and be of no more force or effect."

"In case of loss or damage to any building hereby insured the company is liable for such loss or damage to the whole amount of insurance, provided such amount does not exceed two thirds of the value of the building. But this company shall in no event be liable for more than two thirds the actual cash value of such building at the time of the loss."

It appeared by the evidence that in the spring of the year 1880, one Barber moved into the house, as a tenant of the plaintiff; that the house had then been unoccupied about a month and a half; that Barber moved out with his family and furniture about six o'clock in the evening of August 19th of that year; and that the house was discovered to be on fire and nearly consumed between two and three o'clock of the same night.

The plaintiff offered evidence to prove, and claimed to have proved, that the value of the dwelling house insured was \$800; and that of the whole farm \$1700; and that there were sixty acres of land in the farm. The defendants offered the evidence of sundry witnesses living in that neighborhood who testified that in their opinion the house insured was of no greater value than from \$300 to \$500; and that the value of the whole farm was no more than from \$1000 to \$1400. They further offered sundry witnesses, one of whom was a surveyor, who testified as to the number of acres in the farm. From their testimony the defendants claimed they had proved that it contained less than fifty acres. They also offered the evidence of sundry witnesses acquainted with the business of insurance, who testified that the risk would be increased by the non-occupancy of a dwelling house situated as the one named in the policy was.

No witnesses were called to prove that the statements in the application as to the value of the whole farm or as to the number of acres it contained related to the risk assumed or that they in any way affected it.

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The defendants requested the court to charge the jury as follows:

1. The application being referred to in the policy as forming a part thereof, all the statements contained therein are warranties on the part of the assured.

2. It is of no consequence whether the warranty is material to the risk or not. If untrue there can be no recovery upon the policy.

3. The statements in the application that the value of land and buildings is \$1700, and that there were sixty acres of land in the place, are warranties, and if the jury find that the value of the land and buildings, at the time of making the application, was less than \$1700, or if the jury find that there were less than sixty acres of land in the place, then there has been a breach of such warranty, and there can be no recovery in this action.

4. By the terms of the policy the insurance thereunder ceased as soon as the house became unoccupied. If the jury find that the house was unoccupied when the fire occurred, then there can be no recovery for the loss.

5. If the jury find that the value of the house, at the time it was insured, was less than \$800, the amount stated in the application, then there was a breach of the warranty as to the value of the house, and there can be no recovery in this action.

6. By the terms of the policy the defendants are not liable in any event for more than two-thirds the actual cash value of the building insured, and if the jury find that this value was less than \$750 at the time of the fire, then the plaintiff's recovery in this case must be limited to two-thirds of the sum that the jury shall find was the actual cash value of the building.

The judge charged the jury as follows:—

“In this case the application is expressly referred to in the policy, so that the policy is to be read just as though the application, its questions and answers, were copied into it. The statements in the application are warranties, provided they relate to the risk assumed.

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“Any statement relates to the risk assumed when it defines or in any respect limits it. In other words, a statement relates to the risk when the jury can see that if the statement had been different the contract whereby the risk is assumed would, in all probability, have been different or never have been made at all. A statement that relates to a collateral matter, or one that relates to some mere trivial thing or to some outside circumstance, or one that is introduced into the policy for some other purpose than to define or limit the risk, would not be a warranty. If a statement in fact relates to the risk, whether it affects the risk little or much, it is a warranty.

“If you find that the statement of the value of the land at \$1700, or of the number of acres at sixty, or either of them is false, and that they or either of them related to the risk as above stated, then there can be no recovery by the plaintiff.

“This presents two questions for the jury. Were the statements false? and second, did they relate to the risk? In respect to the land, in deciding the question of value, you will remember that values are always liable to fluctuation and depend largely on the character and opinion of men. There was no undertaking that this farm should always be worth \$1700, nor was there any undertaking that any or all of the people of the town where it is situated should be of the opinion that it was worth so much. A man might own a horse of superior speed and blood which he believed to be worth \$1000; another man might regard the horse as worth only \$500, and still another only \$300 or \$100, and all of these men be equally honest. The owner of such a horse if he wished to insure it would be likely to state the value at his own estimate. And it would be hardly just to say that he was guilty of a false warranty when the other men came into court and stated that in their opinion the horse was of much less value than the \$1000. You will inquire whether, in answering the question, Mr. Bennett told the truth. Did he speak honestly or did he tell a lie? Was the land worth to him at that time,

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according to his honest judgment, \$1700? If he answered the question according to his best judgment and belief, if there was no intentional over-valuation, then in the opinion of the court there was no falsity in the answer.

"In respect to the quantity of land substantially the same rule may be applied. Was there any over-statement as to acreage? Did Mr. Bennett speak falsely, or did he tell the truth when he made the answer? It is for you to decide. If he told the truth then there was no falsity in this behalf.

"If there was no falsehood in these statements, then the other question does not arise. If on the other hand you find that either of the statements—that is, in respect to the value or quantity of land—was intentionally made too large, then you will inquire whether they related to the risk, applying the test that I have already given you, and if you find that these answers, or either of them, did relate to the risk, then there can be no recovery.

"If the house had ceased to be occupied within the meaning of the policy, that defeats a recovery by the plaintiff. In this connection you will keep in mind that in the application it is stated that the house is to be occupied by a tenant, and this clause of the policy should be construed according to the ordinary usages of a tenant house. There was no contract, expressed or implied, that there should be no change of tenants while the policy was in force. On the contrary such changes are so frequent that they must have been contemplated as probable. During the time between the retiring of one tenant and the incoming of another, there may be a vacancy which may continue for a longer or a shorter time, and may exist in spite of the landlord's best efforts to prevent it. Now we can hardly suppose that the parties intended that any such vacancy, however short, would avoid the policy. Such a construction seems to us unreasonably straight. The inconvenience of such a construction is a strong argument against it. It accords better with the probable intention of the parties to hold that such a vacancy does not *ipso facto* avoid the policy. Applying this rule, if you find the house had ceased to be occupied, your verdict should be for the defendants.

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"The total amount the defendants can be made to pay is \$500. The defendants only agreed to pay two-thirds of the cash value, not exceeding \$500. So you will inquire what was the cash value of this house at the time of the fire, and then find two-thirds of such sum. And this will be the amount the plaintiff is entitled to receive if it does not exceed \$500. If the two-thirds exceed \$500, it will be your duty to return a verdict for only \$500, with interest thereon from two months after the proof of loss."

The jury returned a verdict for the plaintiff, and the defendants appealed the case to this court on the ground that the judge had erred in his charge to the jury and in refusing to charge as requested.

J. L. Hunter and A. H. Sawyer, for the defendants.

1. The application is referred to in the policy as *forming a part thereof*. By the express terms of the policy "all statements contained in the application will be taken and deemed to be *warranties on the part of the assured*." The statements therefore in the application that the value of the dwelling-house was \$800; that there were sixty acres of land in the place; and that the value of the land and buildings was \$1700—were express warranties on the part of the plaintiff. Angell on Ins., §§ 140, 141; May on Ins., § 156; *Glendale Manf. Co. v. Protection Ins. Co.*, 21 Conn., 19; *Kelsey v. Universal Life Ins. Co.*, 85 id., 287; *Chase v. Hamilton Ins. Co.*, 20 N. York, 57; *Ripley v. Aetna Ins. Co.*, 30 id., 136, 163; *Rohrbach v. Germania Ins. Co.*, 62 id., 61; *Graham v. Fireman's Ins. Co.*, 87 id., 69.

2. The statements in the application as to value and number of acres being warranties, and being in the nature of conditions precedent, they must be literally true, or there could be no recovery upon the policy. It is of no consequence whether they were material or not, or for what purpose or with what view they were made, or whether the assured had any view at all in making them. Marshall on Ins., 249; May on Ins., § 156; *Duncan v. Sun Ins. Co.*, 6 Wend., 488; *Chase v. Hamilton Ins. Co.*, 20 N. York, 57;

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Ripley v. Aetna Ins. Co., 30 id., 163; *Boyce v. Lorillard Ins. Co.*, 55 id., 244; *Rohrbach v. Germania Ins. Co.*, 62 id., 62; *Graham v. Fireman's Ins. Co.*, 87 id., 74; *Wood v. Hartford Fire Ins. Co.*, 13 Conn., 544.

3. The statements in the application as to the value and the number of acres were made in answer to specific inquiries in the application. In such cases the question of the materiality of the statement, in respect to the risk, is settled by the parties as a matter of contract. A broad distinction exists between statements made in answer to inquiries and those made otherwise. In the one case the answers are made material by the act of the assured, whether they are in fact or not, while in the other case, even though the statements are made a part of the policy, they are not efficacious as warranties, although material in fact. *Wood on Ins.*, 422; *Graham v. Fireman's Ins. Co.*, 87 N. York, 77; *Davenport v. N. E. Ins. Co.*, 6 Cush., 340; *Draper v. Charter Oak Ins. Co.*, 2 Allen, 569.

4. These statements were material warranties, aside from the fact that the parties have made them so by their contract. It was necessary that the defendant should be advised, by the application, of the real value of the dwelling-house, in order that it might not insure more than two-thirds its value. It was equally necessary that it should be advised of the number of acres of land in the place, and the real value of the entire property, land and buildings, in order that it should not make an insurance upon buildings equal to the amount of the real interest of the assured in the property, ascertained by deducting from its cash value the amount of all incumbrances thereon. For example: The incumbrance upon this property was stated to be \$800. If the entire property, land and buildings, was worth but \$1000, as several of the witnesses stated, then the entire interest of the assured in the property could not exceed \$200, and the defendants could not safely, and would not, have placed any insurance whatever upon the building. The answers made to these questions, it will be readily seen, not only related to the risk, but were material thereto.

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In this case they were especially so because the property was situated in another state; the agent of the defendants, through whom the insurance was effected, had, as appears by the application, made no personal examination of the property, and the company, in issuing the policy, relied entirely upon the statements made by the plaintiff.

5. The plaintiff was bound to know what the application contained, and to know that its statements were correct. *Ryan v. World Mutual Life Ins. Co.*, 41 Conn., 172. The court below erred in instructing the jury that if there was no intentional over-valuation of the property, and no intentional mis-statements in regard to the number of acres, then there had been no breach of warranty. The judge seemed to have entirely misapprehended the nature and effect of a *warranty*, and to have regarded it as necessary for the defendants, in order to show a breach of warranty, to make proof that would convict the plaintiff of a fraud; and the jury must have so understood his instructions.

6. The policy contained a condition rendering it void if the dwelling-house insured should cease to be occupied as such. The proof showed that the house was unoccupied about a month and a half in the spring of 1880, that it was thereafter again occupied, and that the tenant moved out about six in the evening on the day preceding the fire, and that the house remained unoccupied until it was destroyed by fire about two o'clock the next morning. This was clearly a violation of this condition of the policy. By the terms of the policy the insurance ceased immediately upon the dwelling-house becoming unoccupied, and it was of no consequence how long it had remained unoccupied, or whether such vacancy was a reasonable one. "The court can not make a contract for the parties, or give to that made any other or different effect than its just interpretation warrants, however unjust or inequitable such condition may appear. Thus, where a policy provides that, in case at any time during the existence of the policy the premises shall be unoccupied, the policy shall thereby become void, if the premises are vacant for *one day* the policy becomes void,

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and a subsequent loss can not be recovered." Wood on Ins., 551; see also *Sonneborn v. Manufacturers' Ins. Co.*, 44 N. Jer. Law, 220; *Paine v. Agricultural Ins. Co.*, 5 N. York Sup. Ct. R. (T. & C.), 619; *Thayer v. Agricultural Ins. Co.*, 5 Hun, 566; *Whitney v. Black River Ins. Co.*, 9 id., 41; *Abrams v. Agricultural Ins. Co.*, 40 U. Canada Q. B., 175; *Etna Ins. Co. v. Meyers*, 63 Ind., 238; *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457; *McClure v. Watertown Fire Ins. Co.*, 90 Penn. St., 277; *Herrman v. Adriatic Ins. Co.*, 85 N. York, 162; *Cook v. Continental Ins. Co.*, 70 Misso., 610; *American Ins. Co. v. Padfield*, 78 Ill., 167; *Keith v. Quincy Ins. Co.*, 10 Allen, 228; *Ashworth v. Builders' Ins. Co.*, 112 Mass., 422; *Franklin Savings Inst. v. Central Ins. Co.*, 119 id., 240; *Corrigan v. Connecticut Ins. Co.*, 122 id., 298.

T. M. Maltbie, with whom was *C. H. Briscoe*, for the plaintiff.

1. The provision of the policy with reference to non-occupation of the premises is as follows:—"If any dwelling house hereby insured shall cease to be occupied as such, this policy shall cease, and be of no more force or effect." This clause evidently refers to a change from the use of the premises as a dwelling house, or to an intentional abandonment of it for that purpose, continued for some considerable time. Any vacancy that was incidental to its occupation as a tenant house, and evidenced no purpose to change its use or abandon it for that purpose, would not work a forfeiture of the policy. A mere surrender of one tenant, without the entry of another, is not such a change or non-occupation as is contemplated by the policy. May on Ins., §§ 247, 248, 249, and cases there cited. The whole question of occupancy was submitted to the jury, as requested by the defendants. The court instructed the jury that "if the house had ceased to be occupied within the meaning of the policy, that would defeat a recovery by the plaintiff," and in the same connection read to the jury from the opinion of this court in *Lockwood v. Middlesex Mut. Assurance Co.*, 47 Conn., 553, 561. In view of the circumstances and of the

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very reasonable doubt as to whether the fire did not originate during occupancy by the tenant, the charge was more favorable than the defendants were entitled to. *Lounsbury v. Protection Ins. Co.*, 8 Conn., 459; *Hough v. City Fire Ins. Co.*, 29 id., 11; *Boon v. Aetna Ins. Co.*, 40 id., 586.

2. The court instructed the jury with reference to warranty substantially as the defendants requested. The only qualification was that statements in the application, in order to be warranties, must relate to the risk assumed. The general rule in regard to what constitutes a warranty in a contract of insurance is well settled. "Any statement or description or any undertaking on the part of the insured, on the face of the policy, which relates to the risk, is a warranty. Whether a fact, quality or circumstance specified relates to the risk or is inserted for some other purpose, must be settled before the rule can be applied." *Wood v. Hartford Fire Ins. Co.*, 13 Conn., 533. See also *Billings v. Tolland Mutual Fire Ins. Co.*, 20 Conn., 139; *Glendale Manf. Co. v. Protection Ins. Co.*, 21 id., 34; *Sheldon v. Hartford Fire Ins. Co.*, 22 id., 244. The representations in the application, which were made an issue in the trial below, relate solely to the value of the property insured and the quantity of land in the farm. If the applicant regarded the property as of the value stated, there would be no breach of the warranty, although other people differed with him as to the valuation, and placed a less one upon it. It cannot be the intent of the insurer that the insured shall by investigation determine the value of his property, but the purpose must be to ascertain his opinion of its value. All the insured is required to do is to give an honest valuation. The court laid down a rule with reference to such valuations, which correctly stated the law, and was as applicable to the value of the house burned as to the value of the entire farm. The jury must have found the house worth at least \$750, and in so finding found that the plaintiff's valuation of it at \$800 was substantially correct. The same rule applies with reference to the quantity of land in the farm. This question had no relation to the risk assumed.

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But in any event the insured is only required to give his honest opinion, and not to ascertain accurately by survey or otherwise the exact quantity of land. Upon these points questions at issue were fairly submitted to the jury.

3. A new trial will never be granted unless the court can see that injustice either was, or might have been, done on the former trial. This rule is so well established and has been so often applied by this court, that a citation of authorities in support of it is wholly unnecessary. It is manifest that the verdict here is strictly in accordance with justice.

CARPENTER, J. This is an action on a fire insurance policy. The building insured was a dwelling house occupied by a tenant. The answer interposed several defences which will be separately noticed. The plaintiff had a verdict and the defendant appealed.

1. That the house was unoccupied at the time of the fire.

The policy provides that if "the dwelling house hereby insured shall cease to be occupied as such, then this policy shall cease and be of no more force or effect." The finding shows that the tenant left the house, taking with him all his furniture, about six o'clock in the evening. The next morning about two o'clock the house was destroyed by fire.

The defendant requested the court to instruct the jury as follows:—"By the terms of the policy the insurance thereunder ceased as soon as the house became unoccupied. If the jury find that the house was unoccupied when the fire occurred, then there can be no recovery for the loss."

The court did not so charge the jury, but instructed them as follows:—"If the house had ceased to be occupied within the meaning of the policy, that defeats a recovery by the plaintiff." After reciting the language of the policy, the court proceeded as follows:—"In this connection you will keep in mind that in the application it is stated that the house is to be occupied by a tenant, and this clause of the policy should be construed according to the ordinary usages of a tenant house. In this case the building was insured to

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be occupied by tenants, and is so expressed in the policy. There was no contract, expressed or implied, that there should be no change of tenants while the policy was in force. On the contrary such changes are so frequent that they must have been contemplated as probable. During the time between the retiring of one tenant and the incoming of another, there may be a vacancy which may continue for a longer or shorter time, and may exist in spite of the landlord's best efforts to prevent it. Now we can hardly suppose that the parties intended that any such vacancy, however short, would avoid the policy. Such a construction seems to us unreasonably straight. The inconvenience of such a construction is a strong argument against it. It accords best with the probable intention of the parties to hold that such a vacancy does not *ipso facto* avoid the policy. Applying the rule as here laid down, if you find the house had ceased to be occupied, your verdict should be for the defendants."

It will be observed that the court in its charge used the language of this court in *Lockwood v. Middlesex Mutual Assurance Co.*, 47 Conn., 553. It is manifest that the court overlooked an important distinction between that case and this. In that case there was no provision, as there is in this, that non-occupation should avoid the policy; but the question was whether it increased the risk. The contract was not explicit but was open to construction for the purpose of ascertaining what was the probable intention of the parties. Here they have told us in plain terms what they mean. The contract is neither obscure nor ambiguous, and there is no room for interpretation. The court erred in charging as it did.

It is true that the building burned in a few hours after it was vacated. But under this clause in the policy we are unable to see that time is material. The important question was—was it in fact unoccupied?

The plaintiff contends that the fire probably originated before the premises were vacated. Conceding that to be an important inquiry, it was a question of fact for the jury and

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not of law for this court. We cannot assume the fact to be as claimed, nor that the jury necessarily found it to be so, as the question was not made in the court below.

2. That there was a breach of the warranties contained in the policy.

A clause in the policy reads thus:—"All applications for insurance must be made in writing, and signed by the applicant or by his authority, and all statements contained in the application will be taken and deemed to be warranties on the part of the assured."

The application contained the following questions and answers:—*Quest.* "How many acres of land in the place?" *Ans.* "Sixty." *Quest.* "What is the value of land and buildings?" *Ans.* "Seventeen hundred dollars."

The defendant requested the court to charge the jury as follows:—"1. The application being referred to in the policy as forming a part thereof, all the statements contained therein are warranties on the part of the assured. 2. It is of no consequence whether the warranty is material to the risk or not. If untrue there can be no recovery upon this policy."

The court did not so charge, but charged that the "statements in the application are warranties, provided they relate to the risk assumed," and then submitted to the jury two questions:—(1) Did the statements relate to the risk? and (2) were they untrue?

In this too the court erred. The parties made these matters material, and they must be so regarded whether they related to the risk or not. The only proper question for the jury was whether they were true. If they were not true there was a breach of the warranty and there can be no recovery. If they were true in the sense in which the parties understood them then there was no breach.

A new trial is advised.

In this opinion the other judges concurred.

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JERRY S. WILSON vs. THE WILLIMANTIC LINEN COMPANY.

A master is bound to provide for his servant a reasonably safe place for his work and reasonably safe appliances.

Where, instead of attending personally to it he employs another, who does it negligently, so that the servant receives an injury by reason of the negligence, the master is equally liable.

The general rule that a servant can not recover for an injury caused by the negligence of a fellow-servant has no application to such a case.

While it is the duty of a servant to use ordinary care in noticing the condition of machinery at which he is working, yet he can not be expected to notice latent defects or any that are not obvious to one not an expert in machinery.

If a servant has been guilty of negligence in such a matter, yet it must be negligence essentially contributing to the injury.

A manufacturing corporation employed a superintendent who had charge of all its machinery and works in several mills. Under him and appointed by him were overseers of the several rooms, whose duty it was to keep watch of the machinery and oversee the work in their respective rooms. These overseers appointed second-hands whose duty it was to act as overseers of the rooms in their absence. There was also an overseer of repairs, whose duty it was to make repairs on notice from the superintendent or overseer of a room that repairs were needed. Some new machinery having been procured the person setting it up notified the superintendent that collars were needed on certain countershafts before they were used, and the superintendent notified the overseer of repairs to put them on, but through negligence he failed to do so, and by reason of the want of a collar a countershaft fell and injured the plaintiff, an employee in the room. Held that the negligence was that of the corporation and that it was liable for the injury.

And held to make no difference that the plaintiff was not using the machine as an operative at the time of the injury, but was assisting the overseer of the room by his direction in setting up the countershaft preparatory to its being used by the operatives.

CIVIL ACTION for an injury to the plaintiff, an employee of the defendants, by means of defective machinery; brought to the Superior Court in Windham County. The defendants suffered a default and were heard in damages before *Hovey, J.* The court found the facts and gave its opinion and judgment upon them as follows:—

At the time of the injury the defendants were and for

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some time had been a corporate body, engaged in the business of manufacturing cotton thread and spools by means of machinery operated by water power, and for that purpose employing numerous servants and workmen, in the village of Willimantic in the town of Windham. Their property and affairs, during that time, were under the government and direction of a board of nine able and competent directors, one of whom was president and another vice-president; but none of them, except the vice-president, exercised any personal supervision of the manufacturing department of the corporation. He was the general manager of the corporation, and was a competent and in all respects a fit and suitable person for that position. In the manufacturing department, the officer next in rank or grade to the general manager was the resident agent. He had the direct charge of the property of the corporation in Willimantic and was directly responsible to the general manager that the property and the men in the employ of the corporation were, each in their way, doing their proper work. He, also, was a fit person in all respects for his department. The first person in charge under him was known as the superintendent. He was the manufacturer and also the master mechanic of the corporation. He had the direct charge of all the machinery of the corporation and its construction and use, and was a competent and suitable person for the place. He had had a large experience in the business and, in cotton manufacturing in New England, was at the head of his profession. The corporation then had in Willimantic four cotton mills, known as mills Nos. 1, 2, 3 and 4 respectively, and one spool-shop, in which their business of manufacturing was carried on; and of all these mills the superintendent, in his department, had the general charge. The several rooms in each mill, the shafting, countershafting and machinery, and the persons employed to do the work therein, were in the immediate charge of overseers appointed and employed, in behalf of the corporation, by the superintendent, and of persons called second-hands, employed by the respective overseers with the approval of the superintendent,

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to act when the overseers were absent. There was also in the service of the corporation an overseer of repairs, who was a competent and fit person for the position. The overseer of each room was entrusted by the superintendent with the power to employ the necessary servants or help to do the work required to be done in his room, and to discharge those whom he might deem unfit or unnecessary. It was his duty at all times to see that his room was clean and in order, that the persons there employed were performing their respective duties, that each machine was fulfilling its work, and that if any machine or any shaft in his room required repairs, to notify the overseer of repairs, and if he did not make the repairs, to notify the superintendent. But it was no part of his duty to procure, put up or set new or repair old machinery, shafting or countershafting. Those duties were devolved upon the superintendent, or the overseer of repairs under the superintendent's direction. When new countershafts were hung and new machines were set in any room and pronounced by the parties hanging or setting them, or by the overseer of repairs, to be ready for use, but not before, they came under the charge of the overseer of that room. It was then the duty of the overseer to start up the machines and put them in operation, and for that purpose to connect them by means of belts with the countershafts and to connect the countershafts by the same means with the main shaft. But, before doing so, it was his duty to examine the several machines and see that the rolls were all right and that the rails were free and traversed easily; also to set the traverses and to see that they were all properly oiled and that the rails were properly balanced. It was also his duty to see that the countershafts were in a fit condition to run and that the necessary belts were made and properly put on. If he discovered any defect in the countershafts or machines, which he could not remedy, it was his duty to report the same immediately to the superintendent or to the overseer of repairs. If the report was made to the superintendent, it was his duty to notify the overseer of repairs, and it was the duty of the overseer of

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repairs on receiving the notice from the superintendent, or directly from the overseer in charge of the defective shafting or machinery, to remedy the defect or the defects and make the necessary repairs. The duty of the second-hand was to do whatever the overseer, when present, required him to do, and in his absence to take his place and perform his duties.

In the month of May or June, 1880, the defendants remodeled the attic room of mill No. 1, and caused to be placed therein some new countershafts and some new spinning frames. The countershafts were hung nine feet above the floor of the room. Some of them were straight shafts, being of an uniform diameter their entire length, and were set in open end hangers. Collars were required on those shafts to hold and keep them in position and prevent them, when in motion, from slipping out of the hangers and falling to the floor. Without collars they were incomplete, imperfect and dangerous to those who might attempt to use or belt them. Some other of the new countershafts were set in open end hangers but were kept in position by shoulders turned at each end. Those could be distinguished from the straight shafts, when the latter were without collars, only upon a careful inspection. And other countershafts were set in hangers closed at the outer end, and those were called closed end hangers. The hangers were put up and the new countershafts were set by parties competent to do the work, according to plans or drawings prepared by order of the superintendent, and under the immediate supervision of the overseer of repairs. But some of the straight shafts were set in open end hangers without collars, and were left in that condition by the parties who set them, because the overseer of repairs, whose duty it was to furnish the collars, had not a sufficient supply on hand for the purpose. Notice of the fact was promptly given to the superintendent by the party who set the shafts, and the superintendent at once notified the overseer of repairs and ordered him to make the collars and put them on. Collars were accordingly put on some of the shafts

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that needed them by the overseer of repairs; but others, through his negligence, remained without collars for a period of from four to six weeks after the order to put them on was given by the superintendent, and until after the plaintiff sustained the injuries of which he complains. During that period and before, Philip Wilson, the father of the plaintiff, was the overseer of the room in which those shafts were set and William L. Kenyon was his second-hand. They were competent and fit persons for those positions, but neither of them was informed or had knowledge of the defective condition of the shafts. Wilson was directed by the superintendent to start up the new spinning frames in his room as soon as they should be set and in readiness for use. The frames were properly set and in readiness for use a short time before the 19th of August, 1880. On the 18th of August, 1880, the plaintiff was employed by Wilson, in behalf of the defendants, to assist in starting up the new frames the next day and, after that, to act as his second-hand; and he entered upon the performance of his duties in the morning of August 19th, 1880. The compensation to be paid him was ten dollars a week. He had previously worked in that room about eight years, ending some time in 1879, and the last three of those years he acted as the second-hand of his father. In the morning of August 19th, 1880, he and one Horn, another employee of the defendants in Wilson's room, were directed by Wilson and by Kenyon his second-hand, to prepare the necessary belts to connect the new countershafts with the new spinning frames and put them on and start up the frames as soon as they could, as the defendants were in a hurry for the yarn that was to be spun upon those frames. In obedience to that direction they commenced work between 7 and 8 o'clock in the morning, and in the course of the forenoon prepared belts for and belted two or three frames and got them ready to start.

At noon, when the machinery in the mill was stopped, the overseer of repairs, at the request of Wilson, examined the pulleys on one of the countershafts and set them, or saw

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that they were set, in range with the pulleys on the spinning frames that that shaft was to drive, and with the pulleys on the main shaft. It was his duty to see that the pulleys were properly set, and that the shaft was ready for the belting, and ready to be connected with the spinning frames. After he had made the examination and set the pulleys, as requested, Wilson inquired of him if they were all right, and on receiving the reply that they were, caused the countershaft to be connected by a belt with the main shaft.

The countershaft was a straight shaft, set in open end hangers without collars; but that was not noticed by the overseer of repairs, notwithstanding the order given him more than a month before to supply the shafts of that description with collars; nor had it been noticed by the overseer of the room or his second-hand, nor by the superintendent in his visits to that room, which had been made daily, sometimes twice or thrice in a day, from the time the shaft was hung. But Wilson, the overseer, supposing, from what the overseer of repairs had said to him, that the countershaft was complete and in a proper condition to be connected with the frames it was to drive, did not examine it to see whether it needed collars, but directed the plaintiff and Horn to put on the belts from the countershaft to the frames and start up the frames in the afternoon. They accordingly prepared the belts, and in the afternoon, while they were attempting to put one of them on a pulley of the countershaft which was in motion, and thus connect the countershaft with one of the spinning frames, the shaft, for the want of collars, was thrown from its bearings and out of one of the hangers in which it was set, and, breaking the other hanger, fell and struck the plaintiff and inflicted upon him severe and permanent injuries. The plaintiff had no knowledge or information that the shaft needed collars, but supposed and believed that it was complete and ready to be put in operation. Nor had he any knowledge or information that it was his duty, before attempting to connect the shaft with the spinning frame, to examine the shaft and see that it was in such a condition that the connection could be

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safely made ; though it was proved to be the understanding among mill-owners and those having charge of mills and of their several departments, that it is the duty, not only of overseers and second-hands, but also of every person who is employed and directed to connect shafting with machinery, to see that every thing is in a proper condition before attempting to make the connection, and that if they fail to do so they are guilty of negligence.

Upon these facts the plaintiff claims that he is entitled to recover of the defendants substantial damages. This claim is resisted by the defendants, who insist that nominal damages only should be assessed against them, because, they claim, that the injuries sustained by the plaintiff were caused, not by any neglect or fault on their part, but by the negligence of the plaintiff's fellow-servants. They further claim that if they were chargeable with the negligence of the overseer of repairs in leaving the shaft that fell without collars, or the negligence of the overseer of the room in which the shaft was hung in not ascertaining the condition of the shaft before he directed it to be belted to the frame it was intended to drive, they cannot be subjected to more than nominal damages, because, they claim, that the negligence of the plaintiff essentially contributed to produce the injuries.

The judicial decisions in this country and in England have firmly established the rule that a master is not liable for injuries sustained by one of his servants through the negligence of another, while both are engaged in the same general business, unless the servant by whose negligence the injuries were occasioned was incompetent or otherwise unfit for the duty or work he was employed and called upon to perform, and his employment is attributable to the want of reasonable care on the part of the master. The rule is founded upon considerations of public policy and upon the obviously just and rational principle that one who engages in the employment of another for the performance of specified duties and services for compensation, assumes and takes upon himself the natural and ordinary risks and perils inci-

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dent to the nature of his employment, including his liability to injury from the negligence of those who, with due care on the part of the master, have been employed as his fellow-servants. And the rule applies not only in those cases in which the servant injured is engaged in the same grade of employment as the servant whose negligence occasioned the injury, but also in cases in which the two servants are engaged in different grades of employment, if the services of each are directed to the same general end. It also applies to cases where the injured servant is of a grade of the service inferior to that of the servant whose negligence occasioned the injury, though the inferior in grade is subject to the direction of the superior. And it is not essential in order to exempt the master from liability that the injured servant, at the time of receiving the injury, should be engaged in the same particular work as the servant by whose negligence the injury was occasioned. If both servants are in the employment of the same master, work under the same control and in the same general business, and derive authority and compensation from the same common source, the master is not liable. But this rule has no application where a servant sustains an injury through the master's negligence alone, or through the negligence of the master combined with the negligence of a fellow-servant. The reason is that the servant, though assuming and taking upon himself, as incidental to his employment, the risks of injury from the negligence of fellow-servants while engaged in the same general business, does not agree to take the risks or chances of any negligence on the part of the master. The master is bound to exercise reasonable care to provide, for the use of his servants and for their protection and security, suitable machinery, implements, materials and appliances, and to employ as their associates and co-laborers none but fit and competent persons; and if he fail to perform those duties and in consequence of such failure any of his servants are injured, he will be responsible for the injuries, though the negligence of a fellow-servant contributed to produce them. Contributory negligence, to defeat a

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right of action in such a case, must be the negligence of the party injured. That the defendants exercised proper care and thus performed their duty in the selection and employment of agents and servants for the prosecution of the business in which they were engaged, is not and cannot be questioned. Their general manager, their resident agent, their superintendent, their overseer of repairs, their overseer of the room in which the plaintiff was injured and his second-hand, were competent and in all respects fit persons for their respective positions; and there was no evidence or claim that any of their subordinate servants or employees were incompetent or otherwise unfit for the duties with which they were entrusted. But the important duty imposed by law upon the defendants, of exercising reasonable care to provide for the use of their servants in the attic room of mill No. 1, suitable machinery, implements and appliances, was not performed, unless performance was effected by the order of the superintendent to the overseer of repairs to supply the shaft that fell with the necessary collars. Performance could not, however, be effected by the giving of an order, but only by doing the act which the order commanded to be done. "That some general agent, clothed with the power and charged with the duty to make performance for the master, has not done his duty at all, or has not done it well, neither shows a performance by the master nor excuses the master's non-performance. It is for the master to do, by himself or some other. When it is done, then, and not till then, his duty is met or his contract kept. The servant then takes the risk of the negligence, recklessness or misconduct of his fellow in the use of the materials and implements, and of their failure from latent defects not revealed by practical tests, and from deterioration by the usual wear and tear. It is not enough to satisfy the affirmative duty or contract of the master that he selects one, or more than one, general agent of approved skill and fitness. If the general agent goes forward and carelessly places by the side of a servant another unskilled and incompetent, the duty of the master has not yet been

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met, his contract is yet unperformed. Corporate bodies must, of the necessity of their being, act through agents; and in the large enterprises and business pursuits of the times, the necessity is almost as stringent upon very many other employers. But they may not avoid the duty which they owe to their servants, of furnishing them with sound mechanical contrivances, and accompanying them with competent fellows, by conferring upon superior servants the duty of selecting, purchasing or hiring. The duty being that of principals, and theirs the contract, it is theirs to fulfill and perform; and if it is not done or is insufficiently done, the failure to do is theirs." *Laning v. N. York Central R. R. Co.*, 49 N. York, 521. The overseer of repairs was the person specially charged with the duty of putting the defective shaft in a safe and proper condition. He was, for that purpose, the agent of the defendants, though subject to the orders of the superintendent. He had actual knowledge that the shaft was without collars and, for that reason, could not be put in operation with safety. He was ordered by the superintendent to make the collars and put them on. No one else was authorized or empowered for the purpose, and he alone was relied upon by the defendants to perform the duty. And although he was, for that purpose, a servant as well as an agent of the defendants, he was not, in any legal sense, a fellow-servant of the plaintiff. On the contrary, within the sphere of his employment he represented and stood in the place of the defendants; and his duties were those which the law cast upon them. Within the same sphere, his knowledge was their knowledge, his acts were their acts, his omissions their omissions, and his negligence their negligence. To provide machinery for a mill and put it in a fit condition for use, and to use it after it is provided and put in that condition, are widely distinct matters. They are not employments in the same general business. The one can properly be said to begin only when the other ends. The agent or servant who provides and puts up the machinery, shafting or implements, and the servant who afterwards uses them for the purposes for which

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they are provided and put up, may work under the same master and receive their compensation from the same common source, but this is not sufficient to constitute them fellow-servants in the legal sense. They must, in order to give them that character and establish that relation between them, be, at the time, engaged in a common purpose or employed in the same general business. *Shanny v. Androscoggin Mills*, 66 Maine, 420. The defendants are, therefore, liable for the injuries complained of by the plaintiff, and the plaintiff is entitled to substantial damages thefefore, unless his own negligence essentially contributed to produce them. If this were not the rule, and the doctrine should be upheld that the overseer of repairs, in performing his duties, was the fellow-servant of the plaintiff, a corporation and any employer who carries on his business through general superintendents or agents, would, in most cases, be exempt from liability to servants for injuries occasioned by imperfect and defective machinery, by unsafe mechanical means and appliances of any kind, and by incompetent, unskilful and otherwise unfit sub-agents, selected and provided without reasonable care; a result which no court ought to sanction or sustain.

The question then remains, whether the negligence of the plaintiff essentially contributed to produce the injuries of which he complains. The defendants impute to him negligence of that character, because of his omission to examine the shaft that fell and injured him, before he attempted to connect it with the machinery it was intended to drive; and the imputation would, perhaps, be deserved, if the plaintiff had known that it was the duty of every person employed to connect shafting with machinery to make such an examination. But he had no such knowledge. Whose fault it was that he was ignorant did not appear; it was probably the fault of his father, who was the overseer of the room in which he was employed. But, whether the fault was his or that of some other person, the plaintiff is not chargeable with contributory negligence for omitting to do an act which he had never been apprised it was his duty

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to perform. No other contributory negligence being imputed to the plaintiff by the defendants, and none being disclosed by the evidence, this question, like the other questions in the case, must be decided in favor of the plaintiff.

The conclusion therefore is, that the injuries sustained by the plaintiff resulted from the negligence of the defendants and the negligence of Wilson the overseer combined, and that the plaintiff is not chargeable with contributory negligence. It follows that the plaintiff is entitled to judgment for substantial damages, which the court assesses at three thousand dollars.

From this judgment the defendants appealed to this court, assigning the following errors:

1. That upon the facts found the court should have found as matter of law that the plaintiff was guilty of contributory negligence.

2. That upon the finding the court held that even if the plaintiff had been guilty of contributory negligence in not examining the shafting before connecting it with the machine, yet he could recover if he did not know that it was his duty so to examine the same.

3. That the court erred in holding upon the facts found that the master mechanic and overseer were not both the fellow-servants of the plaintiff.

J. J. Penrose and C. E. Perkins, with whom was J. M. Hall, for the appellants.

Three questions are presented by this appeal: 1st. Was the plaintiff guilty of contributory negligence, and if so was this excused by the fact that he did not understand his duty? 2d. Was there negligence on the part of the defendants, they having been found to have employed competent servants to do the necessary work? 3d. Were not the overseer of repairs and the overseer of the room, by whose negligence the accident occurred, both fellow-servants of the plaintiff?

1. Was the plaintiff guilty of contributory negligence? The nature of his employment at the time of the accident

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distinguishes this case from a large number of cases reported in the books. He was employed, not to labor on machinery already prepared and ready for the operative, but to assist in starting up new machines and putting them in order and making them safe for those who were afterwards to operate them. He had worked in the same room eight years, and the last three years had occupied the position of second-hand. A second-hand was required to take the place and perform all the duties of the overseer in his absence. He was therefore bound to understand the duties of an overseer. The court finds that "it was the duty of the overseer to start up the machines and put them in operation, and for that purpose to connect them by means of belts with the countershafts, and to connect the countershafts by the same means with the main shaft. But before doing so it was his duty to examine the several machines and see that the rolls were all right and that the rails were free and traversed easily; also to set the traversers and see that they were all properly oiled and that the rails were properly balanced; also to see that the countershafts were in a fit condition to run, and that the necessary belts were made and properly put on. If he discovered any defect in the countershafts or machines which he could not remedy, it was his duty to report the same immediately to the superintendent or to the overseer of repairs." It is also found that "he was employed by Wilson, the overseer, in behalf of the defendants, to assist in starting up new frames the next day, and after that to act as his second-hand." The plaintiff was bound to exercise all reasonable care and prudence. Wood's Master & Servant, § 372. But he made no examination whatever of the countershafts with which he was connecting the frame and which was to furnish it motion. The finding admits that he did not examine the shaft and that this would have been negligence in an overseer or a second-hand, but holds that the plaintiff is freed from liability arising from his neglect because he did not know that it was a part of his duty to make such an examination. This part of the case therefore presents this question: Can

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a servant excuse himself for an accident arising from his neglect of his duty, because he did not know what his duty was? The bare statement of the proposition illustrates its absurdity. The servant is bound to know his duty. The contract creates this obligation. There is in every contract of service a promise, either expressed or implied, that the party employed will not only use due care and diligence, but that he also possesses the skill and knowledge requisite for the service he undertakes. 2 Parsons on Cont., 54, Story on Bailm., §§ 432, 433; *Morris v. Redfield*, 23 Verm., 295; *Goslin v. Hodson*, 24 id., 140; *Hall v. Cannon*, 4 Harring. (Del.), 360; *Hager v. Nolan*, 6 Louis. Ann., 70; *Bowman v. Woods*, 1 Greene (Iowa), 441. If ignorance of duty can avail to excuse the plaintiff, why cannot the same excuse be always available to shield a defendant? That the plaintiff assumed, in accepting the employment, all the ordinary risks and perils incident to the performance of the specific work he was employed to perform, is well settled. *Hayden v. Smithville Manf. Co.*, 29 Conn., 548; *Noyes v. Smith*, 28 Verm., 59; *Nashville & Chat. R. R. Co. v. Elliott*, 1 Coldw., 611; *Priestley v. Fowler*, 3 Mees. & Wels., 1. The ordinary risks include the negligent acts of his fellow-workmen in the course of the employment. *Coombs v. New Bedford Cordage Co.*, 102 Mass., 572; *Lovell v. Howell*, L. Reps., 1 Com. P. Div., 161. But independent of the legal obligations incident to the contract of employment and the risks assumed in the performance of the specific work he undertook, the court finds that it was proved "that it is the duty not only of overseers and second-hands, but also of every person who is employed and directed to connect shafting with machinery, *to see that everything is in a proper condition to run before attempting to make the connection*, and that if they fail to do so they are guilty of negligence. The fact found that the overseer Wilson misunderstood what the overseer of repairs said about the countershafts, and supposed they had been put in a proper condition to run, does not affect the question. It does not appear that the plaintiff knew that the overseer of repairs had made

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any examination, and therefore it was no excuse for his failure to perform his duty in making an examination himself before starting the frame. If this accident had happened to a spinner using the frame after it was set up, it might be said with more weight that there was no contributory negligence on his part, because it was no part of his duty to see that the machinery was in proper condition to run, but the very purpose for which the plaintiff was employed was to make the machinery safe for the spinner. If this accident had happened to the spinner, he would have had a cause of action against the plaintiff for not properly performing his duty, and it is clear that in such case the plaintiff could not have pleaded his ignorance of his duty to excuse himself from liability. *Atchison, f.c. R. R. Co. v. Plunkett*, 25 Kan., 188. From all the facts found it seems impossible to escape the conclusion that the plaintiff was guilty of contributory negligence, and therefore should recover in this case nominal damages only.

2. Were the defendants guilty of negligence? The finding on this point is as follows:—"That the defendants exercised proper care and thus performed their duty in the selection and employment of agents and servants for the prosecution of the business in which they were engaged, is not and cannot be questioned. Their general manager, their resident agent, their superintendent, their overseer of repairs, their overseer of the room in which the plaintiff was injured, and his second-hand, were competent and in all respects fit persons for their respective positions; and there was no evidence or claim that any of their subordinate servants or employees were incompetent or otherwise unfit for the duties with which they were entrusted." The duty of the master is performed when he employs competent servants to do the necessary work. *State v. Malster*, 57 Maryl., 287, 307; *Mansfield Coal Co. v. McEnergy*, 91 Penn. St., 185, 191; *Columbus f.c. R. R. Co. v. Arnold*, 31 Ind., 174; *Harrison v. Central R. R. Co.*, 31 N. Jer. Law, 293, 299; *Hard v. Verm. f. Canada R. R. Co.*, 32 Verm., 473; *Gunter v. Granite Co.*, 15 So. Car., 443, 457; *Knox*

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ville Iron Co. v. Dobson, 7 Lea (Tenn.), 867; *Columbus &c. R. R. Co. v. Webb*, 12 Ohio St., 475, 494; *Smith v. Potter*, 46 Mich., 258, 263; *Slater v. Jewett*, 85 N. York, 61; *Holden v. Fitchburg R. R. Co.*, 129 Mass., 268; *Malone v. Hathaway*, 64 N. York, 5; *Murphy v. Boston & Albany R. R. Co.*, 88 id., 146; *Wilson v. Merry*, L. Reps., 1 House of Lords Cas. Scotch App., 326; *Lovell v. Howell*, L. Reps., 1 Com. Pleas Div., 161, *Allen v. New Gas Co.*, L. Reps., 1 Exch. Div., 251. "In all cases the question is one of reasonable care and diligence on the master's part, and unless the master has expressly contracted to superintend his business in person, or the duty is absolute, there is no implied condition that he will do so, and he may delegate that power to others, using due care to select competent persons. A doctrine that held the master to any other rule of liability would be destructive of the best interests of society, and would impose such severe burdens upon employers as would tend seriously to embarrass and retard the growth and development of industrial pursuits."—Wood's Master & Servant, § 411, and cases there cited. "If the master has given such orders to the proper servants as would prevent any harm from being done by dangerous or defective materials, he is exonerated from liability to them, and to all his other servants in the same general employment." Shearm. & Redf. on Neg., § 92. It is submitted with confidence that all the English cases, and the weight of the leading American authorities, fully support this doctrine. In a state like Connecticut, filled with manufacturing and other corporations affording employment to vast numbers of our people, and necessarily carrying on their business by servants and agents, the adoption of any other rule of liability would work peculiar hardship.

3. The accident resulted from the negligence of the plaintiff, combined with the negligence of the overseer of the room and the overseer of repairs. Both these overseers were fellow-servants of the plaintiff. It appears from the finding that the plaintiff was employed not to use the machines, but to set them up, ready for use. All the authori-

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ties relating to the duty of the master to furnish proper machinery, relate to their duty to the persons who were to *use* the machinery and not to those who were to set it up to be used by others. The overseer of repairs was a fellow-servant of the plaintiff, because they were both engaged in the service of preparing machinery to be used. If this accident had happened to the spinner using the frames, it might be said with more weight that the overseer of repairs was not a fellow-servant of his, because they were engaged in different occupations; but in this case it was the duty of both the overseer of repairs and the overseer of the room, as well as of the person setting up the machine, to see that the countershaft was fit to start, and where persons have a common duty they are fellow-servants. Supposing the overseer of the room had been the person injured while setting up frames and connecting them with countershafts. It was his duty equally with the overseer of repairs to see that the countershafting was in order, and the plaintiff stands in the same position as the overseer of the room. And it makes no difference that the servant, whose negligence occasioned the injury, is a sub-manager or foreman or overseer of higher grade or greater authority than the plaintiff. *Hayes v. Western R. R. Co.*, 3 *Cush.*, 270; *Albro v. Agawam Canal Co.*, 6 *id.*, 75; *Sherman v. Rochester & Syracuse R. R. Co.*, 17 *N. York*, 153; *Slater v. Jewett*, 85 *id.*, 61; *Farwell v. Boston & Wor. R. R. Co.*, 4 *Met.*, 49; *Brown v. Winona & St. Peter R. R. Co.*, 27 *Minn.*, 162; *Lawler v. Androscoggin R. R. Co.*, 62 *Maine*, 463; *Weger v. Pennsylvania R. R. Co.*, 55 *Penn. St.*, 460; *Searle v. Lindsay*, 11 *Com. Bench. N. S.*, 429; *Brown v. Accrington Cotton Co.*, 8 *Hurlst. & Colt.*, 511; *Murphy v. Pollock*, 15 *Irish C. L.*, 224; *Feltham v. England*, *L. Reps.*, 2 *Q. B.*, 33; *Howells v. Landore Steel Co.*, *L. Reps.*, 10 *Q. B.*, 62; *Wilson v. Merry*, (supra). The court below however held that the negligence of the overseer of repairs in not putting proper collars on the countershaft to keep it in place, was the negligence of the corporation. He admits that if that overseer had been a fellow-servant of the plaintiff, the corporation would not have been liable, but he

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holds that he was not such a fellow-servant, that legally he was the corporation, so that his negligence was that of the corporation. His reasoning is this:—The corporation was bound to exercise reasonable care to provide suitable appliances for its servants to use. As a corporation can act only by agents, *any person* who was relied upon to perform this duty was the agent of the corporation for that purpose, and was for that purpose the corporation itself, and his negligence was that of the corporation. The overseer of repairs therefore was not a fellow-servant of the plaintiff at all, but was the master. To maintain this view of the law the court quotes from *Laning v. N. York Central R. R. Co.*, 49 N. York, 521. We submit that the quotation from that case is not law, and if it were it does not apply to the case at bar. The facts in it were that the defendant corporation had deputed its whole power of hiring servants in a certain department of business to an agent, Colby, who had hired a foreman and other persons under him to put up a scaffold. This foreman, though competent when hired, became drunken, which was known to Colby, and by his drunkenness the scaffold was improperly put up; it fell and the plaintiff was injured. The court held that the negligence of the foreman was *not* the negligence of the company, but that the knowledge of Colby of the foreman's drunkenness was the negligence of the company, because he had the sole power of employing and discharging men. This appears from what is said in *Malone v. Hathaway*, 64 N. York, 10, where in speaking of the statements of the judge in the former case they say that general remarks made in relation to a certain proposition "have been applied to other circumstances and *erroneous deductions made.*" The only correct principle to be deduced from that case is, that when a master has delegated to another his *whole authority* in relation to any duty owed to a servant, reserving to himself no power of superintendence or management, then the acts of such agent are the acts of the superior. *Malone v. Hathaway*, *Slater v. Jewett*, and *Murphy v. Boston & Albany R. R. Co.*, before cited. This principle we have no occasion to

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question in this case as it has no relation to the facts here. The only other case cited by the judge below is *Shanny v. Androscoggin Mills*, 66 Maine, 420. That was a case of an employee *using* a machine after it was set up and ready for operation. The negligence of the defendant was claimed to be that it did not keep the machine in repair, and the effect of that portion of the opinion was, that a person whose duty it was to *use* spinning machines for spinning, after they had been set up, were not fellow-servants with those whose duty it was to keep them in repair. What was said on this point was also unnecessary, for the case was decided against the plaintiff on the ground of her contributory negligence. The case, however, does not apply to the case at bar, for here the question does not arise between the spinner using the machine and those who were to prepare it for his use, but between those who were engaged in the common duty of preparing the machinery for use by the spinners. It seems to us that the case of *Murphy v. R. R. Co.*, 88 N. York, 146, before referred to, is exactly in point, and is much nearer to the case at bar than either of the cases cited in the court below. We submit, however, that the better decisions in England and in this country lay down a much more reasonable rule of law than either of these cases, if they mean what the court below claims to be their effect. It is well settled that the duty of a master towards his servant is to exercise reasonable care in providing competent fellow-servants to work with him, and also to provide suitable materials and appliances for him to work with. All will agree on that. The question on which much controversy has arisen is, what are the limits of that reasonable care? It will also be agreed that no master is responsible to a servant for negligence of a fellow-servant, but much controversy has also arisen as to who were fellow-servants. The two questions have in most cases been considered together, and so combined as to render it almost impossible to treat them separately; and certain general expressions applied to cases involving one state of things have been applied to cases involving a very different state

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of things. The best statement of the whole question is to be found in Wood on Master & Servant, § 411: "Whatever might be said as to the implied duty of a master engaged in a small business, who, at the time when the contract of service was entered into, personally took charge of all departments of the business, it certainly could not be held in the case of corporations, which necessarily act through agents, or of large establishments, that the servant knows or ought to know at the time of his employment are operated through agents, that there is an implied obligation on the master's part to personally supervise and oversee his business; but, on the contrary, the more natural and legitimate inference is that the servant took upon himself all the risks incident to the business, conducted, as he knew or ought to have known, by co-servants, and such is the generally, although not universally, accepted rule of law. There can be no good reason for holding a master liable for injuries resulting from defective machinery manufactured by workmen in his employ who have been selected with reasonable regard to their competency and fitness for the business, when he is not liable if the same machinery is purchased by a competent agent, of a third person by whom it was manufactured. In either case the question is, whether the master is guilty of such negligence in the employment of agents that it can be fairly said he is in fault; whether he has failed to act with such ordinary care and regard for the safety of his employees as a man of ordinary prudence would have exercised under similar circumstances; and if he is not at fault in these respects, there is no rule of law that will hold him liable to his servants for injuries that they may sustain from defects in the instrumentalities of the business, whether they were supplied by third persons or were manufactured by his own workmen." The leading case sustaining this view of the law is *Wilson v. Merry*, before cited, where the whole subject is very fully considered. In that case, the owners of a coal pit had employed a sub-manager, and furnished him with suitable workmen and materials to work the pit, and provide

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suitable ventilation. He built a scaffold which so obstructed the ventilation of the pit as to cause an explosion of coal damp, which injured a workman employed in cutting out coal; and the House of Lords held that the owners were not liable, on the ground that the employment of a suitable person and furnishing him with suitable materials for having the necessary work done, was the exercise of reasonable care: that such sub-manager was a fellow-servant with the workmen, and his negligence was that of a fellow-servant. This case, and the principles therein laid down, have been substantially followed and approved of in the numerous cases in this country, many of which have already been referred to. To those already cited we would add *Warner v. Erie R. R. Co.*, 39 N. York, 468, and *Hough v. Railway Co.*, 100 U. S. Reps., 213. There is a class of cases, especially in some of the western states, where it has been held that all the servants of a corporation who are engaged in the purchasing, making and repair of machinery, to be used by another set of servants, are not fellow-servants with the latter, but really are the representatives of the master. In some of these cases it seems to be taken for granted that the master is bound, not to exercise reasonable care in furnishing proper appliances, but to see that they are furnished *at all events*, that is to *insure* the servants against injury from improper appliances. The leading case in this class is *Chicago & North Western R. R. Co. v. Swett*, 45 Ill., 197; and there are similar cases in Missouri, Wisconsin, Iowa, and other western states. These decisions were based upon expressions made by the judges who gave opinions in certain cases in Massachusetts and New York, noticeably *Ford v. Fitchburg R. R. Co.*, 110 Mass., 240, and *Flike v. Bost. & Alb. R. R. Co.*, 58 N. York, 549. The former case, however, is explained and shown not to be susceptible of this construction, in *Holden v. Fitchburg R. R. Co.*, 129 Mass., 268, and the latter is similarly explained in *Slater v. Jewett*, 85 N. York, 61. In other cases it is assumed, especially in cases of corporations which must act by agents, that every agent employed in furnishing or

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repairing the appliances of labor, so represents the master that his negligence is the negligence of the master. One reason for these decisions is to be found in the claim sometimes set up in behalf of corporations, that all the directors had to do was to appoint a suitable manager or managers, and then having exercised due care in their appointment, the corporation was not liable for any negligence on their part; and in opposing this unreasonable claim these courts have been led too far into the other extreme. The true rule lies, as is usual, between the two extremes. The reasonable view sustained by the authorities is this: The master cannot rid himself of the duty of exercising reasonable care by transferring the whole matter of furnishing proper appliances to another. In that case the negligence of that other is the negligence of the master. As is well said in *Malone v. Hathaway*, 64 N. York, 12, "Corporations necessarily acting through agents, those having the superintendence of various departments with delegated authority to employ and discharge laborers and employees, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and within the limits of the delegated authority the acting principal." So in *Hough v. Railway Co.*, 100 U. S. Reps., 218, it is said: "Those at least in the organization of the corporation who are invested with *controlling or superior authority* in that regard represent its legal personality, their negligence from which injury results is the negligence of the corporation." Shearman & Redf. on Neg., § 102; Wharton on Neg., § 229; *Mullan v. Phila. Steamship Co.*, 78 Penn. St., 25. The better cases confine the liability of the master for the negligence of agents to those who have "controlling and supreme authority" over special departments of business, who in respect to those departments are the *alter ego* of the master.

The cases that hold that a person occupying the place

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that the overseer of repairs did here, is not a representative of the master, but a fellow-servant of the plaintiff, are very numerous. *Albro v. Agawam Canal Co.*, (*supra*) ; *Kelley v. Norcross*, 121 Mass., 508 ; *Zeigler v. Day*, 123 id., 152 ; *Smith v. Lowell Manf. Co.*, 124 id., 114 ; *Killea v. Faxon*, 125 id., 485 ; *Lawler v. Androscoggin R. R. Co.*, 62 Maine, 463 ; *Horner v. Illinois Central R. R. Co.*, 15 Ill., 550 ; *Crispin v. Babbitt*, 81 N. York, 516 ; *McCosker v. Long Island R. R. Co.*, 84 id., 77. He was merely one of the many inferior servants of the corporation, not having sole charge of any department of the business which was under his sole control, and in regard to which he represented the corporation, except as any servant who was directed to do any act represented the corporation. The judge below says:—"He was ordered by the superintendent to make the collars and put them on. No one else was authorized or empowered for the purpose and he alone was relied upon by the defendants to perform that duty." The same might be said of any servant who was ordered to perform any duty. The mere fact that he was the servant directed to do this act did not make him the *alter ego* of the master, or give him the "controlling or superior authority," which the cases require to make his negligence the negligence of the company itself. Such a rule, instead of requiring reasonable care from the corporation that proper appliances were furnished, would make it *guarantee* that proper appliances were furnished, which we have shown is not the law. So as to the further deduction of the judge, that the plaintiff and the overseer of repairs were not fellow-servants; where he makes a distinction between those servants who "provide and *put up* the machinery, shafting or implements, and the servant who afterwards *runs* them for the purpose for which they are provided and *put up*." The better cases, we think, say no such distinction exists. But if it does, the case of *Murphy v. Bost. & Alb. R. R. Co.*, before cited, shows that that principle is not applicable to this case. The person who set up the shafting, the person who set up the frame, and the person who connected them together so

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that the spinners could use the machinery, were all three engaged on the common business of preparing the machinery for use by others. It could all have been done by one person, or different persons could do different parts of the necessary labor. They had a common object, the preparing the machinery for operation, for the purpose of being used by the spinners to make thread. It would be an unreasonable refinement to say that the workman who put up the main shaft, the one who put up the countershaft, the one who put on the pulleys, the one who set up the spinning frames, and the one who put on the belts, were all in charge of separate departments of labor under the corporation, and therefore were not fellow-servants, merely because they each did a different one of the various operations necessary to prepare the spinning frame for use.

J. L. Hunter and E. B. Sumner, for the appellee

PARK, C. J. (After stating the facts.) Upon these facts the question is, do they establish negligence in the defendants, which caused the injury to the plaintiff? If the injury was produced by the combined negligence of both parties the plaintiff cannot recover. He is bound to show that the injury was caused by the negligence of the defendants, which he cannot do if his own negligence contributed to its production. Hence, where a question is made with regard to such contributory negligence of a plaintiff, it is convenient to consider separately the facts with regard to the negligence of each party.

Were the defendants guilty of negligence? The controlling facts of the case upon this point are, that the countershaft was constructed and left in an unfit and dangerous condition for use; that it was put up in the defendants' mill, together with other shafting, in order to enlarge the manufacturing capacity of their works, and was run for the first time on the day when the accident occurred; that the superintendent had charge of the construction and use of all the machinery of the mills, both new and old; that he

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superintended the construction of the shaft in question, and had knowledge of its dangerous condition; that he contented himself with giving orders to the overseer of repairs to put collars upon the shaft and make it safe; that after machines were made ready for the workmen in the new department, he gave directions to the overseer of the room to make the shaft ready for communicating power to the new machines and run the same; and that as soon as power was applied the shaft fell and the plaintiff was injured. These are the principal facts in this part of the case, and upon them rests the question of the defendants' negligence.

The plaintiff entered the defendants' service as an employee in their manufacturing establishment; and we are first to consider what duties they assumed regarding him as their servant, and what risks he assumed in the service. The books are full of cases on the subject, but, although they are numerous, they generally agree that the employer is bound to exercise reasonable and proper care to furnish the employee with reasonably safe machinery and tools, and is responsible for neglect in this particular which causes injury to the latter. All ordinary risks incident to the service, including those resulting from the carelessness of fellow-servants, are assumed by the employee, and for these the employer is not responsible.

In *Ford v. Fitchburg R. R. Co.*, 110 Mass., 240, the court say:—"The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the exercise of ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, where the employer is a corporation, by officers and agents, does not relieve the corporation from this obligation. The agents who are charged with the duty of supplying safe machinery are not,

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in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require."

This was said in a case where an engineer sought to recover damages for an injury he received from the explosion of his engine which was out of repair, and the defence was that the want of repair was owing to the negligence of fellow-servants in the department of repairs.

Wharton, in his work on Negligence, § 211, says:—"The question is that of duty; and without making the unnecessary and inadequate assumption of implied warranty, it is sufficient for the purposes of justice to assert that it is the duty of an employer inviting employees to use his structures and machinery, to use proper care and diligence to make such structures and machinery fit for use." In § 212 he says:—"At the same time we must remember that where a master personally, or through his representatives, exercises due care in the purchase or construction of buildings and machinery and in their repair, he cannot be made liable for injuries which arise from casualties against which such care would not protect. It is otherwise if there be a lack in such care, either by himself or his representatives. The duty of repairing is his own, and, as we shall hereafter see, the better opinion is that he is directly liable for the negligence of agents when acting in this respect in his behalf. If the master knows, or in the exercise of due care might have known, that his structures or engines were insufficient, either at the time of procuring them, or at any subsequent time, he fails in his duty." In § 282 he says:—"It is important to remember that the master is liable when the negligence of the offending servant was as to a duty assumed by the master as to working place and machinery. A master, as we have already seen, is bound, when employing a servant, to provide for the servant a safe

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working place and machinery. It may be that the persons by whom buildings and machinery are constructed are servants of the common master, but this does not relieve him of his obligation to make buildings and machinery adequate for working use. Were it otherwise, the duty before us, one of the most important of those owed by capital to labor, could be avoided by the capitalist employing only his own servants in the construction of his buildings and machinery. In point of fact this is the case in most great industrial agencies; but in no case has this been held to relieve the master from the duty of furnishing to his employees material, machinery and structures adequately safe for their work. He does not guarantee that either building, machinery, or organization shall be perfect; but he is bound by the rule *sic utere tuo ut alienum non laedas*, to use such diligence and care in this relation as is usual with good business men in his line. It is not enough for him to employ competent workmen to construct his apparatus. If an expert, he must inspect the work; and if not, he must employ another competent person as expert for the purpose. If such, however, is his duty, he must not only see that the structure he provides is suitable at the outset, but that it is kept in repair, and the repairer's negligence in this respect is the master's negligence." Pierce, in his work on Railroads, § 370, says:—"The company, like any master, is under an obligation to its servants to use reasonable care to provide and maintain a safe road-bed, and suitable machinery, engines, cars, and other appointments of the railroad, and is liable to them for injuries resulting from defects which it knew of, or ought to have known of, and could have prevented by the exercise of such care; and it is under the same duty and liability to maintain these instrumentalities in proper condition. The servant assumes the natural risks of his employment, but not those which the wrongful act of the company has added."

In *Bartonhill v. Reid*, 3 Macq. H. L. Cases, 266, Lord CRANWORTH said "that where a master employs his servant in a work of danger he is bound to exercise due

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care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks." In *Railroad Co. v. Fort*, 17 Wall., 553, the court, in commenting on the risks which servants are presumed to have assumed by the contract of service, said:—"But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the persons placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons is concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason, and cannot receive our sanction." In *Hough v. Railway Co.*, 100 U. S. Reps., 213, the court said:—"A railroad corporation may be controlled by competent, watchful and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its affairs and business, in all of its departments, are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain in suitable condition the machinery and apparatus to be used by its employees—an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the corporation, who are invested with controlling or superior authority in that regard, represent its legal personality; their negligence, from which

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injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant who has been injured without fault on his part, the personal responsibility of an agent, who in exercising the master's authority has violated the duty he owes, as well to the servant as to the corporation. To guard against misapplication of these principles we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for the use of employees. Its duty in that respect to its employees is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees."

This was said in a case where the plaintiff's decedent, an engineer upon the defendants' railroad, was killed while in the performance of his duty in the defendants' employment, by reason of the defective condition of his engine; which defective condition was owing to the negligence of their master-mechanic and of the foreman in their repair department, who were competent and proper persons for their positions. The defence in the case was, in part, the same as it is here, namely, that due and proper care had been exercised in the purchase of the engine and in the selection of the officers charged with the duty of keeping it in proper repair.

The case of *Davis v. Vermont Central R. R. Co.*, 55 Verm., (not yet out, this case appearing in a magazine,) is a very recent and important one upon this subject. The marginal note is as follows:—"In an action on behalf of a fireman of a railroad company, killed by the washing out of a culvert, the negligence of the company's bridge-builder in constructing, and of the road-master in repairing the culvert, is attributable to the company." It was conceded in the case that the bridge-builder and road-master were ordinarily

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skillful and careful men in their several employments, and that the defendants were guilty of no negligence in selecting and employing them. It further appeared that the bridge-builder was intrusted by the defendants with the construction and maintenance of all the bridges and culverts in that division of the road, and that the road-master was likewise intrusted with the construction and maintenance of the track and road-bed of the road. The road-master had under him section-foremen who had charge of section-workmen. These were the important facts of the case. The defendants contended that the bridge-builder, road-master and section-foreman were fellow-servants of the decedent in the running of their trains, and consequently that their negligence was not in law attributable to them, but was one of the risks which the decedent assumed when he entered their service. The court, in deciding the case, use the following language:—"The general principles underlying the determination of the duties and liabilities of the master and the risks which the servant assumes by entering upon the employment, are very generally agreed upon. Where the employment is hazardous it is very generally agreed that the master assumes the duty of exercising reasonable care and prudence to provide the servant a reasonably safe place and reasonably safe machinery and tools to exercise the employment, and to maintain the place, machinery and tools in a reasonably safe condition during the time of such employment. He also assumes the duty of exercising the same measure of care and prudence to provide suitable materials and suitable and sufficient co-servants to properly exercise the employment or carry on the business. When this duty is discharged by the master the servant assumes all risks and hazards attendant upon the exercise of the employment or performance of the work, including those resulting from the negligence and carelessness of co-servants. The diversity in the decisions has arisen in determining who are co-servants in the common employment, and whether the master is to be charged with the negligence of an employee, who in some parts of the employment is strictly a co-servant

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with the person injured, and in other parts is discharging a duty incumbent upon the master." And the court, in criticising the doctrine of the Lord Chancellor in *Wilson v. Merry*, Law Reps., 1 House of Lords Cases, Scotch App., 326, and of other cases which hold that if the master attends in person to the management of his affairs he is responsible for his negligence which causes injury to his servant, but if he commits such management to an agent who is competent and proper for the position he is not responsible for the agent's negligence which causes a like injury, use the following language:—"The question is naturally suggested, why should he [the master] not also be liable for the negligence of the agent or servant whom he has appointed to discharge the same duty in his stead, although he has exercised due care to select a person competent and skillful? Is such an agent or servant, while performing the duty cast by the relation upon the master, a fellow-workman with the master's servant in such a sense that the latter cannot and ought not to recover of the master for injuries sustained through the negligence of the former? If so the master, who performs his part of the duty, as this defendant and all corporations must, by agents and servants, secures an immunity from liability which the master who personally enters the service to manage and direct the performance of the work, does not enjoy. The doctrine now established by the United States Supreme Court, and by most of the courts of last resort in the several states, holds the master liable to his workman for injuries sustained from the negligent performance of duties which rest by the relation upon the master, whether the master performs such duties personally or through an agent or servant." In conclusion the court say:—"When the case of *Hard v. Vermont & Canada R. R. Co.*, 32 Verm., 473, was decided, the liability of the master was held to be dependent upon whether the servant whose negligence caused the injury and the servant injured were fellow-servants in a common employment and work. Making this the test for determining the master's liability, the reasonings and con-

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clusions of the late Chief Justice are unanswerable. But this test, while determinative in a great number of cases, has been abandoned both in England and in this country, and in lieu thereof the master's liability has been made to rest upon whether the negligence arose in the performance of a duty for the careful discharge of which he became responsible when he assumed the relation of master to the injured servant. On these principles, which we think furnish the true ground upon which the master's liability rests, and on the American application of them, the bridge-builder and road-master, while inspecting and caring for the defectively constructed culvert, were performing a duty which, as between the intestate and the defendants, it was the duty of the defendants to perform. Their negligence therein was the negligence of the defendants, being the agents of the defendants for the performance of those duties. Notice to them in regard to the defective construction of the stockade as affecting the safety of the culvert, was notice thereof to the defendants."

On the same principle the superintendent and master-mechanic and the overseer of repairs in the defendants' establishment were performing the duty which the relation of master and servant cast upon the defendants, when they superintended the construction and undertook to attend to the condition of the countershaft in question. Their act was the act of the defendants, their knowledge of its unsafe condition was the defendants' knowledge, and their negligence in the premises was also the negligence of the defendants.

Suppose that the superintendent and master-mechanic had been the owner of the defendants' establishment, and was running the works when the injury occurred. Could there be a doubt regarding his liability to the plaintiff, so far as the question we are now considering is concerned? All the cases hold that he would have been bound to exercise reasonable care to provide safe appliances for the plaintiff's use. Such appliances were not provided. The superintendent knew that the countershaft was not fully constructed, and

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that it was left in an unsafe and dangerous condition to be used. What care did he take to make its condition safe before he ordered it to be run? He simply directed the overseer of repairs to complete the unfinished appliance, but took no measures to ascertain whether it was finished or not before the plaintiff was injured. All the authorities cited, and indeed all the cases, hold that it is not enough for the master to order safe machinery to be constructed, but he must exercise reasonable care to see that the machinery is in fact safe after the order has been executed. It would be an easy matter for a master to escape liability if an order to construct safe machinery would be sufficient. That would be equivalent to exculpating him entirely from all liability in this regard. It is clear there would have been no escape for the superintendent and master-mechanic, so far as his negligence was concerned, had he been the master here. How then can there be any escape for the defendants on this ground? The superintendent and master mechanic was performing the duty of the defendants when he superintended the construction of the appliance in question, for he had the special charge of this department of the defendants' business. The case is barren of all information tending to show that any officer of the corporation above the superintendent cared for the proper construction and safe condition of this appliance, and if the superintendent did not represent the defendants in this regard then they had no representative, and they were equally culpable for the want of one, for an unsafe and dangerous appliance was in fact furnished for the plaintiff's use, and they were bound to know what was being done in their immediate presence in this respect. The appliance was constructed to enlarge the capacity of the defendants' works, and so far as the enlargement and every thing pertaining to the case are concerned, all were new, and stand exactly as the defendants' works originally stood when they first began to be operated. We think it is clear that there is no escape for the defendants so far as the question of their negligence is concerned.

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But it is said that the plaintiff, in belting the countershaft to the spinning frame, was engaged in the same common employment with those who constructed the shaft itself; that they all were preparing the spinning frames for use, and consequently were co-laborers or fellow-servants together; that the overseer of repairs was one of them, and for his negligence in omitting to put collars upon the shaft the defendants are not responsible, for it was the negligence of a fellow-servant, the risk of which the plaintiff assumed by the contract of service. And they cite the case of *Murphy v. Boston & Albany R. R. Co.*, 88 N. York, 146, in support of the claim. If it be conceded that the overseer of repairs was a fellow-servant of the plaintiff in the work he was doing, still the claim does not exonerate the defendants from the effect of the negligence they committed through their superintendent and master-mechanic, for the law is so that the master is responsible for an injury produced by the combined negligence of himself and a fellow-servant of the injured employee. 2 Thompson on Negligence, 981; Wharton on Negligence, § 227; *Paulmier v. Erie R. R. Co.*, 34 N. Jer. Law, 157; *Cayzer v. Taylor*, 10 Gray, 274; *Booth v. Boston & Albany R. R. Co.*, 73 N. York, 38; *Perry v. Ricketts*, 5 Ill., 284.

But the case of *Murphy v. Boston & Albany R. R. Co.*, (supra,) was a very different one from the case at bar. There the court held that the employees who repaired the boiler of the steam engine that exploded and injured the plaintiff were fellow-servants with the employee who set the safety valve to the boiler, for the engine was no more a complete machine without the safety valve than it would have been without the boiler. These essentials were simply different parts of the same engine. Here the belt formed no part of the countershaft. It merely communicated the power of the shaft to the spinning frames, and was as much a part of the frames as it was of the shaft. If this connection was a part of the shaft, then all the connections of the shaft back to the engine or water wheel, as the case may be, were parts of it, and the whole establishment was one vast

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machine. The defendants admit that the spinners would have had a cause of action against the defendants had they been injured by the falling of the countershaft, and still they put on and off the belt making the connection between the countershaft and spinning frames many times a day, in doing their work as spinners. The belt is turned on to a loose pulley when it is turned off the frame, but the pulley is a mere convenience for putting the belt on again. The act itself is precisely the same as was that of the plaintiff when he was injured. The case of *Murphy v. Boston & Albany R. R. Co.*, which the defendants rely upon in this part of the case, holds, that if the engine had gone out upon the road, and its fireman or engineer had been killed by its explosion while in use, there would have been a cause of action against the company. But it might have been said with equal propriety in that case, as it can be said here, that the fireman in supplying fire and water to the engine was merely preparing it for use, as much as the boiler-maker in repairing the boiler; and that the work of both was essential before the engine would be ready for use. Fire and water in that case performed a similar office with that of the belt here. The engine was a complete machine in and of itself, but it required fire and water to make it useful. The countershaft was a complete appliance in and of itself, but it was useless without a belt. There is nothing in this claim.

Was the plaintiff guilty of negligence which contributed substantially to produce the injury of which he complains?

It is said by the plaintiff that the court below has not found that he was negligent in not making an examination of the shaft before applying the belt to it; but on the contrary has found that he was not in fact negligent. The defendants contend that negligence is a compound question of law and fact; that the court having found all the facts, it is for the law to say whether he was guilty of negligence or not. Without stopping to consider whether or not this is so, in a case of this character, we think it is clear that an important fact is wanting to constitute negligence,

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so as to relieve the defendants from responsibility upon this ground. It is not enough for a plaintiff to be negligent. He is not necessarily deprived of the right to recover simply because he has been so; but the additional fact must appear that the negligence contributed substantially to produce the injury for which he sues. Here the claimed negligence consists in not making an examination of the shaft before putting the belting on it. Had the plaintiff made the examination what probability was there that he, a non-expert, taken that day from the street, would have discovered that the countershaft was without collars and needed them, when there were two other modes used in the mill for hanging shafts which rendered collars unnecessary, and in relation to one of them the court finds that the fact whether the shaft needed collars or not could be ascertained "only upon a careful inspection." The overseer of repairs, an expert, who knew that the shaft needed collars, made an examination of it just before it was belted, and failed to discover that it was without them. The superintendent of the mill, who was also the master-mechanic of all the defendants' works, had paid daily visits to the room in his professional capacity for a considerable period of time, and though he likewise knew how the shaft was hung, and that it was constructed without collars, he failed to discover that it was then without them. Had the plaintiff made an examination he was only bound to look for obvious, manifest defects. Wood (Master & Servant, 749,) says: "The servant is not required to inspect the appliances of the business, to see whether or not there are latent defects that render them more than ordinarily hazardous, but only to see whether there are defects or hazards that are obvious to the senses. If the servant, from any source, has the same information that the master has, he is bound to act upon it; but the general statement made in some of the cases, that if the servant has the same means of information that the master has, the latter is excused from liability, must be taken in a qualified sense, and only applies to information in fact possessed by the servant or that which is

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patent and obvious. * * If, as is said in some of the cases, a servant cannot recover if he has the same means of information that the master has, he would be bound to look for defects, to inspect the appliances of the business, and would thus be burdened with the duties that legally and properly devolve upon the master, and could seldom recover for injuries resulting from the use of defective machinery."

Such being the case, the finding of the court that the defect in question could not have been discovered by the plaintiff without "a careful inspection," is equivalent to finding that, if the plaintiff had made an examination, he would not have discovered the defect. Consequently if he was guilty of negligence in the premises, the negligence did not contribute to the production of the injury for which he complains.

But was he guilty of negligence? The claim of the defendants that he was, is based upon the following finding of the court: "It was proved to be the understanding among mill-owners and those having charge of mills and of their several departments, that it is the duty, not only of overseers and second-hands, but also of every person who is employed and directed to connect shafting with machinery, to see that every thing is in proper condition before attempting to make the connection, and if they fail to do so they are guilty of negligence."

What have we here tending to show that it was the duty of the plaintiff to make the examination? Can a private understanding among mill-owners and those having charge of mills, not communicated to their employees, create the duty? No such understanding had ever been communicated to the overseer of the room even, although he had been many years in the defendants' employ; much less to the plaintiff, who had just come from the street to go into the defendants' employment. It would seem that such understanding, even among mill-owners, must have been confined to machinery in use, requiring their employees to look out for defects caused by ordinary wear and tear, and not to new machinery just from the hand of the mill-owner.

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In relation to such machinery it would seem that their understanding must have permitted employees to rely upon the duty of mill-owners to exercise reasonable care and to furnish safe machinery in the first instance.

There is no error in the judgment appealed from and it is therefore affirmed.

In this opinion the other judges concurred.

THE TOWN OF CROMWELL vs. THE CONNECTICUT BROWN STONE QUARRY COMPANY.

A town has no power to agree, for a valuable consideration, to discontinue a highway. The mode of discontinuing highways is fixed by statute, with a provision for an appeal by any party aggrieved, and a town cannot, at its mere pleasure, discontinue them.

And a town cannot enforce a promise of the other party of which its own promise to destroy a public right was the consideration.

ACTION for breach of a contract to construct and open a highway; brought to the Superior Court in Middlesex County. The defendants demurred to the complaint, and the court (*Hovey, J.*) held it insufficient. The plaintiffs then amended the complaint, and the defendants again demurred, and at a later term the court (*Sanford, J.*) sustained the demurrer and rendered judgment for the defendants. The plaintiffs appealed to this court. The case is sufficiently stated in the opinion.

S. A. Robinson and A. W. Bacon, for the appellants.

S. L. Warner, for the appellees.

PARDEE, J. In 1869 Elisha Bloomer owned a tract of land in the town of Cromwell through which passed a highway which we will designate as highway No. 1. The town

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voted that if he would pay to it \$3,000 and at his own expense construct, deed to it, and keep in repair for five years, another highway across the land, which we will designate as No. 2, in a course and manner to be approved by its selectmen, it would authorize and direct them to discontinue No. 1, and if he would execute a written agreement to construct at his own expense, and deed to it within five years thereafter, another highway across the land which we will designate as No. 3, in a course and manner to be approved by its selectmen or its committee, and would secure the performance of this last agreement by a mortgage of the land, he might close up No. 2. In the same year he deeded to the town the land necessary for highway No. 2, to be held until he should construct and convey No. 3, upon condition that No. 2 should then be discontinued and revert to himself, and agreed at his own cost to construct and keep in repair No. 2 for five years.

Subsequently the Cromwell Brown Stone Quarry Company became the owner of the land, and the town having extended for five years the time within which highway No. 3 should be completed, the company executed its bond to the town in the sum of \$4,000, conditioned upon the performance of the agreement of Bloomer as to highways Nos. 2 and 3. Subsequently the defendant became, and now is, the owner of the land, and refuses to construct highway No. 3. The town claims a decree enforcing the immediate construction thereof and \$4,000 damages. Upon demurrer the case is reserved for the advice of this court.

Bloomer, in entering into the contract to construct and deed highway No. 3 to the town, took to himself five years in which to perform it; and in behalf of his successor in ownership the town added five years more; so that the consideration underlying his agreement is the promise of the town that at the end of ten, possibly of more years, a highway existing thus long may be discontinued and be enclosed by him. This promise the town had no power to make or fulfil. The statute (Revision of 1875, p. 237, chap. 7, § 35,) provides that "the selectmen of any town may, with

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its approbation, by a writing signed by them, discontinue any highway or private way therein, except where laid out by a court or the General Assembly; and any person aggrieved may be relieved by application to the Superior Court, to be made and proceeded with in the manner prescribed in the twenty-ninth section of this act." Therefore discontinuance is not at the pleasure of the town, but is the result of judicial investigation and determination over which it has no control. And notwithstanding the fact that Bloomer undertook to reserve the right at some indefinite day in the future to recall his dedication, it may well happen that long before that day the use of the way may have been such that the necessities and convenience of the unorganized public may require its continuance; and if such should be the case it must be continued regardless of votes or contracts.

The right of the plaintiff to ask for a decree compelling the construction of way No. 3, rests upon its promise to destroy a public right. But the court will not sacrifice that right for the purpose of enforcing a private contract concerning it.

It is not necessary to consider other questions raised.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

**MARY E. REED *vs.* MELVIN B. COPELAND AND ANOTHER,
EXECUTORS.**

The plaintiff was a niece of T., who was a widower seventy years of age, and without children, and with a large estate, and had at his request and on his promise to compensate her amply, gone to live with and take care of him. After she had lived with him five years he spoke of intending to make his will and give her a bequest, which he explained, and asked her if she would be satisfied with it. She replied that she would. He soon after informed her that he had made the will. He did in fact make the will, which was the one left by him at his death five years

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later, and a part of the bequest to her was ten shares of the stock of the Aetna Life Insurance Company, which was all that he owned. At the time he spoke to her about the bequest, he said that he should do more for her from time to time. About a year later he handed her the certificate for the ten shares, saying "I give this to you." She took it and put it in a drawer with her valuable papers. A few months later, the insurance company having issued to him as the owner of the ten shares, forty shares of new stock created out of its surplus, he delivered the certificate to the plaintiff, saying to her, "This insurance stock of yours is good stock; they give forty shares for ten; it is only a change of form, that is all; I paid nothing for it." She took the certificate and placed it with the other. The court found that he intended to vest in her the ownership of the forty shares as well as of the original ten, and that both parties supposed them to have become her property. She continued to serve him faithfully, till his death at the age of eighty-one. Held, that an equitable title to both the ten shares and the forty vested in the plaintiff. And held that the transaction was not to be regarded as a testamentary gift, and so needing to be in writing, as T's promise "to do more for her from time to time, showed that what more he intended to do was to be done in his life-time.

Also that the transaction was not invalid under the statute of frauds, because not in writing. The delivery of the certificates was a symbolical delivery of the stock, whereby the contract became executed.

And the case resting on equitable ground, a court of equity would not allow the plaintiff to be wronged by the interposition of the statute against her.

And held not to affect the case that the charter and by-laws of the insurance company provide that transfers of stock shall be made only at the office of the company, by the shareholder or his attorney, on surrender of the certificate. This provision relates only to the legal title to the stock.

In an equitable assignment the assignor, retaining the legal title, becomes a trustee for the assignee.

And held not to affect the case that the will gave the plaintiff a legacy, which included the ten original shares of stock, and which was to be in lieu of all claims on the testator's estate, and that she had accepted the legacy. The stock was given her by the testator before his death, and therefore at his death constituted no part of his estate, and her right to the forty shares constituted therefore no claim on his estate. She was simply taking what was already her own.

An equitable remedy that existed against a party in his life-time, exists equally against his legal representatives after his death.

SUIT to compel the transfer of stock; brought to the Superior Court in Middlesex county. The following facts were found by the court:—

About the 8th of December, 1871, the plaintiff entered the family of Charles C. Tyler, the deceased, under the fol-

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lowing circumstances: Mr. Tyler's wife had been taken ill a short time before, and died on the 10th of that month. She was a sister of the plaintiff's mother. The plaintiff came in answer to a telegraphic dispatch from Mr. Tyler. At that time she was living with her parents at Jacksonville, in the state of Illinois, but was temporarily absent, attending school at Oswego, in the state of New York. She was about eighteen years of age. Mr. Tyler had no children nor any relatives living in Middletown, the place of his life-long residence, nor near there.

Very soon after the death of his wife Mr. Tyler proposed to the plaintiff, and earnestly requested, that she should live with him during his life, and superintend his household affairs, and minister to his wants in sickness and in health. She replied that she could not promise to do so at that time, not knowing that her parents would give their consent.

A few days after this the plaintiff's mother came there, when, in the presence of the plaintiff, Mr. Tyler said to her that he wished she would give her consent to the plaintiff's remaining with him during his life and taking charge of his household affairs. At first the mother objected, saying it was asking a great deal; that the plaintiff was young and would have to leave her school and give up the best part of her life. Mr. Tyler was very persistent, and to induce the plaintiff and her mother to assent to his proposition, he promised that he would amply compensate her for her services, and make such provision for her that she should never want for anything during her life, and treat her as if she were his own daughter. Relying upon this promise, the plaintiff complied with his request, the mother having given her consent.

From this time the plaintiff continued in the family of Mr. Tyler, taking charge of it and ministering to his wants in sickness and in health, up to a few days prior to his making his will in February, 1877.

Up to this time there had been no definite agreement between the plaintiff and Mr. Tyler, as to the manner in which she should be provided for, or the amount of compensation she should receive.

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He then informed her that he was about to make his will, and was going to provide for her therein as he had agreed, and asked her if she would be satisfied with the following provisions: The homestead and all the personal property therein, except the piano-forte; ten shares of the stock of the National Bank of Portland, and ten shares of the stock of the *Aetna* Life Insurance Company, which last stock he said was worth over \$5,000. This he represented would be sufficient to enable her to live upon and take care of the place, and inquired of her if she would be satisfied with those provisions, saying at the same time that he should do more for her from time to time. The plaintiff replied that she would.

After this, and on the same day, he informed her that he had made his will and had done just as he said he would, requesting her to say nothing to any one about it excepting to her parents, who, he said, had a right to know; with which request she complied. At this time Mr. Tyler had but ten shares of the *Aetna* Life Insurance stock.

The will was in fact made by him at that time. The bequest in it to the plaintiff was as follows:—

“I do give, devise and bequeath to my niece, Mary E. Reed, of Middletown, and her heirs forever, my dwelling house where I now dwell and reside in said city of Middletown, on the north side of Washington street, together with the land attached and belonging to the same, and all the buildings situated thereon; also all of my household furniture of every description which shall be in and about my said dwelling house at the time of my decease, and all articles of personal property of every name and description in said dwelling house, except the piano-forte, and all and each of the garden tools and implements on said premises; to have and to hold the same, and the same to be to said Mary E. Reed and her heirs forever, in fee simple, for her and their own sole use and benefit.

“I do also further give and bequeath to my said niece, Mary E. Reed, and her heirs forever, ten shares of the capital stock of the Portland National Bank, located in the

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town of Portland in this state; also ten shares of the capital stock of the *Ætna* Life Insurance Company, located in the city of Hartford in this state: to have and to hold the same, the same to be to the said Mary E. Reed and her heirs forever, for her and their own sole use and benefit. The above devise and legacies are in lieu of all claims upon my estate."

The will gave other legacies to the amount of fifteen thousand dollars, and the residue of the estate to the three brothers of the testator and their heirs. It was drawn by the testator himself, who was a lawyer. He possessed a large estate, and the property here in question is not needed for the payment of debts or legacies. The will was dated February 22d, 1877, and had not been changed at the time of his death.

Mr. Tyler had a safe in his house with only one drawer in it, and that was not kept locked. The key to the safe was kept in a place to which both he and the plaintiff had access. The plaintiff kept all her valuables in the drawer of this safe, and he also kept his valuables therein, including the certificate for the insurance stock.

About a year after the execution of the will Mr. Tyler requested the plaintiff to go to the safe and bring him the drawer containing the certificate of insurance stock. The plaintiff did as requested. Thereupon he took from the drawer the certificate for ten shares of *Ætna* insurance stock, and handing it to the plaintiff said:—"I give this to you." The plaintiff tried to thank him for it, which he would not permit, saying: "Oh, pshaw! show your thanks by doing for me."

The plaintiff took the certificate and read the contents, and then put it in the drawer of the safe, where it remained until the death of Mr. Tyler.

On the 19th of November, 1878, the *Ætna* Life Insurance Company issued, for each share of their stock then outstanding, four additional shares, and sent to Mr. Tyler a certificate of forty new shares. After receiving it he delivered it into the hands of the plaintiff, remarking at

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the same time: "This *Ætna* Life Insurance stock of yours is good stock; it is all right; they give forty shares for ten; it is all the same, all the same as the ten shares; it is only a change in form, and that is all; they have watered the stock; I paid nothing for it." She received it and deposited it with the other certificate in the safe.

At all times during Mr. Tyler's sickness the plaintiff had the entire control of the key to the safe with his knowledge. Some time before his death he said to her that in case anything should happen to him he desired her to take the key of the safe to S. L. Warner, attorney, who would see that everything right was done to the plaintiff and as it should be. The plaintiff retained the key until after his death, when, in compliance with his request, she handed it to Mr. Warner.

I find that Mr. Tyler intended to vest in the plaintiff the ownership of the said ten shares and of the said forty shares of *Ætna* Life Insurance stock, and that both he and the plaintiff understood, and from and after that time supposed, that she was the owner thereof, and the plaintiff received and retained possession of the certificates. Both parties supposed the said certificates of stock were in the plaintiff's possession while in the drawer of the safe; and I find that they were in fact.

The plaintiff was ignorant of the details of business and did not know that any steps were necessary to be taken to vest the legal title to the stock in her.

The dividends of the stock represented by the certificates were sent to and received by Mr. Tyler until his death, but upon what arrangement between the plaintiff and him (if any) or whether she knew of his having received them, did not appear.

Whenever Mr. Tyler referred to the insurance stock, after having delivered the certificates to the plaintiff, (as he sometimes did), he spoke of it as being her property.

The plaintiff remained with Mr. Tyler and performed her duties faithfully until his death in February, 1882. He was in the eighty-first year of his age at the time of his death.

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He was possessed of a large estate at his decease, which is solvent, and the property in controversy is not needed for the payment of debts or legacies.

The services were not rendered in expectation of reward merely, but on account of the promise and agreement above stated.

The delivering of the certificates of insurance stock to the plaintiff by Mr. Tyler as aforesaid, was not understood nor intended by him simply as a gift, but in recognition and part fulfillment of a moral and legal obligation which he felt he was under to the plaintiff.

The legal title to the insurance stock was not transferred to the plaintiff on the books of the insurance company, and is transferable, according to the provisions of the certificates, and according to the charter and by-laws of the company, only at the office of the company, by the shareholder or his attorney, on the surrender of the certificate.

Mr. Tyler attended to his private affairs up to about the time of his last sickness. He was lame and infirm the last years of his life, and it was difficult for him to get about. He took no new business connected with his profession after the death of his wife. He died suddenly, being taken ill Sunday morning and dying about three o'clock the day following.

The value of the *Aetna* Life Insurance stock at the time of his death, was \$175 per share.

In addition to the devise and legacies given the plaintiff by will, Mr. Tyler, a short time before his death, gave her ten shares of the Chicago, Burlington & Quincy Railroad stock, valued at \$128 per share; also a one thousand dollar bond of that road, valued at \$1,000; aggregating \$2,280. The bond is a four per cent. bond, and the stock pays eight per cent. The insurance stock pays ten per cent. The Portland Bank stock pays eight per cent. The whole annual income of the plaintiff from what was given her by the will, and the railroad stock and bond, is \$300. Taxes on the real estate given by the will are \$310.50. Taxes in Middletown are twenty-three mills on the dollar. Annual expenses

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for repairs and insurance on the buildings may be estimated at \$108.

The value of the devise to the plaintiff is \$12,000, although Mr. Tyler estimated it at \$25,000. The household furniture is worth \$400. The Portland Bank stock is worth \$118 per share. While the plaintiff lived with Mr. Tyler he furnished her with board, clothes and what pocket money she had, the whole value of her clothes and pocket money not exceeding \$100 a year.

All the facts relative to the circumstances under which the plaintiff went into the family of Mr. Tyler; what was said by him and the plaintiff and her mother; what he said, as an inducement to the plaintiff to comply with his request and to the mother to give her consent, as to compensation and being amply rewarded and provided for; what was said to the plaintiff about making his will and having made it; and what was said and done about the *Ætna* Life Insurance stock—are found from evidence which was objected to by the defendants on the following grounds: 1st. As being within the statute of frauds. 2d. As an attempt to control the will by parol testimony. 3d. That the gift was in the nature of a testamentary disposition of property, which by statute must be in writing. 4th. That the plaintiff, having accepted the provisions of the will, is estopped. All said evidence was received, subject to these objections.

On these facts the case was reserved for the advice of this court.

S. L. Warner, with whom was *H. Warner*, for the plaintiff.

1. The plaintiff is entitled to the relief sought on the ground of a contract of Mr. Tyler to make a will vesting this stock in her. On this point the case finds the agreement to give the plaintiff his *Ætna* Life Insurance stock. That stock then was represented by a certificate of ten shares. Its value was in excess of \$5,000. Its income was fifteen per cent. This specific thing, of this value and income, was the subject of the contract. Had the legislature

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reduced it to five shares the identity of the stock would have been the same. Authorizing its increase, so as to give fifty for ten shares, cannot impair the plaintiff's right to the interest in the corporation which the ten shares represented, and which she contracted for. The *contract* is the instrument which governs the rights of the parties, and the will is the means of its performance. The time at which the rights of the parties are to be determined is controlled by the contract alone. It is the minds of the parties which control and not the sole will or caprice of the testator as shown in the will. The contract was for a will vesting this specific property. If the will fails to vest the title by any mistake, oversight or neglect, a court of equity will hold the party in whom the law vests the legal title as trustee for the benefit of the party not in default. *Loffus v. Maw*, 8 Jur., N. S., 607; *Stephens v. Reynolds*, 6 N. York, 458; *Parell v. Stryker*, 41 id., 480; *Johnson v. Hubble*, 5 Am. Law Reg., 177. In *Podmore v. Gunning*, 7 Simons, 644, the question of agreements respecting devises and bequests of estates is well considered. There the point was made that they did not bind the specific estate, but the court held that they bind both real and personal estate. In all these cases equity holds the thing contracted to be done as done, and decrees accordingly.

2. Considering the gift as a gift *inter vivos*, the plaintiff is entitled to the relief sought. The declaration accompanying the delivery of the possession of the certificate is sufficient to create a gift. The mutual consent and concurrent will of both parties essential to a gift, are here found. Not only this; actual possession of the certificates of stock until the decease of Mr. Tyler was maintained by the plaintiff, and during all this time the deceased considered the plaintiff as the owner of the stock. Here was a transfer of an equitable title to the stock to the donee with the avowed and manifest design that thereafter the donee should hold it as her own property, and the gift became irrevocable. 3 Wait's Actions & Defences, 489. It is no answer to say that the gift was voluntary and that equity therefore will

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not enforce it. On the execution of the gift the deceased is shown as having expected a benefit for it; this he has received. And the court finds that it was induced by a desire to discharge a moral and legal obligation. Further, the relationship which the contract created was to be that of parent and child, the plaintiff to be treated "as the daughter" of the deceased. Gifts supported by either one of these elements are not treated as voluntary, but are sustained in equity. *Kekewich v. Manning*, 1 DeG. McN. & G., 176; *Colyear v. Countess of Mulgrave*, 2 Keen, 87; *Bunn v. Winthrop*, 1 Johns. Ch., 329; *Minturn v. Seymour*, 4 id., 498. But were the transaction purely voluntary, whatever the law may be elsewhere, in this court it is held, in accordance with the more modern authorities, that choses in action, not negotiable, and negotiable paper not endorsed, may be the subject of a gift without a complete transfer of the legal title, in such manner as to vest the equitable title in the donee, entitling him to the protection of a court of equity. *Camp's Appeal from Probate*, 36 Conn., 88; *Minor v. Rogers*, 40 id., 512; 3 Wait's Actions & Defences, 491.

3. The court will support the gift as a gift *mortis causa*. On the defendants' claim no other legal results can follow. The stock certificates had been placed in the plaintiff's hands as a gift. This act and intention are found. She had received it as such, both parties supposing the equitable title had passed to the plaintiff. She had held possession of the property many months prior to his death. It was kept in the safe, which, by the will, had been given to the plaintiff. In connection with these facts the defendants contend that the deceased had the power of revocation of the gift. Admit it, yet the gift was never revoked, and her possession continued down to the last act of the deceased touching the stock, and on to his death. The case finds that some time before his death the testator said to the plaintiff, "that in case anything should happen to him, he desired her to take the key of the safe to Mr. Warner, his attorney, who would see that everything right was done to the plaintiff, and as it should be." He was aged and infirm, and was contemplat-

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ing a fatal termination of his maladies when he used the expression, "if anything happens to me." He meant his approaching death, and it was so understood. The delivery of the key, under these circumstances, was a symbolical delivery of the stock, and made a good gift *causâ mortis*. Such a delivery is a good one in such cases. Redfield (on Wills, vol. 2, p. 304, note 25,) says: "There is now no question but that the delivery of a key of a warehouse is a sufficient delivery of the goods therein." * * "The form of the transmitting possession is not essential. The question is, has the testator parted with the dominion of his property or not?"

4. The transaction vested the equitable title to the stock in the plaintiff, and the executors become trustees of its legal title in equity for her. Such would be the case upon our claims touching the contract to make a will and vest the title in her, and also in the other possible aspects of the case if treated as a gift. But the finding presents the plaintiff's rights in a still stronger aspect. Between the plaintiff and the deceased the relation of contracting parties existed. Services for a lifetime were to be rendered, and have been received. "Ample compensation" was to be paid. In recognition of the moral and legal obligations of that contract the deceased delivered this stock into the possession of the plaintiff with the intention to pass the ownership to her, and she received it. Both supposed that she was the owner. This was done in part fulfilment of a contract. Can any doubt arise as to the plaintiff's obtaining an equitable title to the stock on these facts? A contract for the sale of stock becomes executed by a delivery to the purchaser of the certificate. Such delivery is held analagous to the delivery of chattels, and as rendering the transfer complete. Ang. & A. on Corp., § 564; *Howe v. Starkweather*, 17 Mass., 244; *Sargent v. Franklin Ins. Co.*, 8 Pick., 98; *Wilson v. Little*, 2 Comst., 443; *Colt v. Ives*, 31 Conn., 25. No words are necessary to create a trust. "In English jurisprudence a trust is an equitable right, title or interest in property, real or personal, distinct from the legal ownership thereof." 2

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Story Eq. Jur., § 964. Every assignment of a chose in action is a declaration of trust. Id., § 1040. The rule is stated by HINMAN, C. J., in *Brown v. Brown*, 18 Conn., 415. He there says "the question is not what the donor can be compelled to do; but what the donee can call upon the representatives of the donor to do. In other words, whether the executor, in case of a gift of personal property, and the heir in case of a gift affecting the realty, is not by virtue of a trust arising by operation of law a trustee for the donee." Redfield lays down the rule that equitable remedies against executors and administrators exist to the same extent as they did against the decedent. 2 Redf. on Wills, ch. 10, sec. 40.

5. As to the objections to the evidence noted in the finding. Neither of them is valid.—1st. The statute of frauds is never a bar to a case presenting equitable grounds of relief, particularly for specific performance, or the protection of a trust established.—2d. The claimed delivery of the stock was prior to the time when the will became operative. And if not, our claim that the will was made in the execution of a contract makes it subordinate to the contract. In any event the construction of the will was not in question under any issue of the case.—3d. The gift (if the court construes it to be such) was in no sense testamentary.—4th. The case does not find that the plaintiff had "accepted the provisions of the will," but, on the contrary, the whole case is predicated upon the ground that the plaintiff bases her right on her contract and the claimed gift. But if she had accepted the provisions of the will, on what ground would she be estopped? Surely this will could not divest her of her rights under the contract. And the devises in the will are "in lieu of *all claims upon his estate*." The legal title to this stock is no part of the estate of the deceased. It gives no beneficial interest. The taking of it does not diminish the estate. The legal title to the stock vests in the executors only to prevent a lapse of the title and to aid in the administration of justice. Suppose Mr. Tyler had been in a proper instrument created trustee for the plaintiff of fifty

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other shares of this stock, would acceptance of the provisions of the will bar her claim to such property? Clearly not.

G. A. Fay, for the defendants.

1. A will speaks from the death of the testator, and not from its date. 1 Wms. Exrs., 221; 2 id., 1439; 1 Redf. on Wills, 379; 2 id., 588.

2. The bequest of "ten shares of the capital stock of the *Ætna Life Insurance Company*," is a general and not a specific legacy, and the stock dividend afterwards declared did not pass as accessory to the ten shares. 2 Redf. on Wills, 466, 473; 2 Wms. Exrs., 1439; *Gilliat v. Gilliat*, 28 Beav., 481; *Tift v. Porter*, 8 N. York, 516.

3. The object of this proceeding is to control the provisions of Mr. Tyler's will. The plaintiff claims "a correction of the mistake in the will." As this is not a case of latent ambiguity, parol evidence is not admissible. 1 Redf. on Wills, 539; 2 id., 493, 745; 1 Jarman on Wills, 408, 417; 2 Wms. Exrs., 1199, note; *Avery v. Chappel*, 6 Conn., 270, 274; *Barrett v. Wright*, 13 Pick., 45; *Hei v. Heller*, 53 Wis., 415.

4. Viewed as a gift, the transaction cannot be supported, for a gift of a chattel must take effect at once and delivery is absolutely essential. 1 Parsons on Cont., 234; 2 Kent Com., 439; *Brown v. Brown*, 18 Conn., 416; *Shurtliff v. Frances*, 118 Mass., 155; *Cummings v. Bramhall*, 120 id., 552; *Noble v. Smith*, 2 Johns., 52; *Curry v. Powers*, 70 N. York, 212; *Trow v. Shannon*, 78 id., 446; *Young v. Young*, 80 id. 422; *Trough's Estate*, 75 Penn. St., 115; *Zimmerman v. Streepner*, id., 147; *Bond v. Bunting*, 78 id., 210; *Olney v. Howe*, 89 Ill., 556; *Brewer v. Harvey*, 72 N. Car., 176; *Trimmer v. Danby*, 25 L. Jour., Equity, 424.

5. Viewed in whatever light, there never was any legal transfer of the forty shares of insurance stock from the testator to the plaintiff, as the charter and by-laws of the company provide that said "stock is transferable only at the office of said company by said Tyler or his certain attorney, on surrender of this certificate." *Shipman v. Ætna Ins.*

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Co., 20 Conn., 246; *Minor v. Rogers*, 40 id., 519; 3 Wait's Actions and Defenses, 491. "The settled law of Connecticut is, that where such clauses are found in the charter and by-laws or either (i. e. regulations *de transfer of stock*), the transfer is invalid, and of no effect for *any* purpose, unless made or registered on the books of the company." Field on Corp., § 308. See also *Marlboro' Manf. Co. v. Smith*, 2 Conn., 579; *Northrop v. Newtown & Bridgeport Turnp. Co.*, 3 id., 544; *Northrop v. Curtis*, 5 id., 246; *Oxford Turnp. Co. v. Bunnell*, 6 id., 552; *Howe v. Starkweather*, 17 Mass., 243; *Palmer v. Merrill*, 6 Cush., 286; Ang. & A. on Corp., § 353.

6. Viewed in the light of a contract to transfer these forty shares in consideration of services, parol evidence is not admissible as being within the statute of frauds. *North v. Forest*, 15 Conn., 404; *Tisdale v. Harris*, 20 Pick., 9; *Dole v. Stimpson*, 21 id., 387; Story on Sales, §§ 268, 276. If any part of the supposed contract is within the statute, the whole is. Browne on Frauds, § 140, *et seq.*; *Atwater v. Hough*, 29 Conn., 508, 515; *Howard v. Brower*, 37 Ohio St., 402. Part performance will not take this case out in law or equity. Browne on Frauds, §§ 118, 448, 452; *Hall v. Rowley*, 2 Root, 165; *North v. Forest*, 15 Conn., 405.

7. While at common law no delivery is necessary between the parties in the sale of a chattel, yet that rule does not prevail in cases of shares of stock or choses in action. *Howe v. Starkweather*, 17 Mass., 243.

8. The plaintiff's supposed agreement cannot be sustained as a declaration of trust. *Potter v. Yale College*, 8 Conn., 61; *Curry v. Powers*, 70 N. York, 212; *Young v. Young*, 80 id., 422; *Zimmerman v. Streeper*, 75 Penn. St., 147; *Richards v. Dalbridge*, L. Reps., 18 Eq. Cas., 11, 13; *Jones v. Lock*, L. Reps., 1 Ch. App., 25.

9. Whatever the nature of this supposed agreement is, it was not to take effect until the testator's death, and was therefore void, as being in the nature of a testamentary disposition, and required by our statute to be in writing. Gen. Statutes, p. 369, § 2; Perry on Trusts, § 92; *Frost v. Frost's Admr.*, 33 Verm., 646; *Crispin v. Winkleman*, 57 Iowa, 523.

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10. The plaintiff having accepted the provisions of the will so far as beneficial, the doctrine of election applies, and she is estopped from claiming anything inconsistent with the will. "It is a principle of equity that a person who accepts a benefit under an instrument, must adopt the whole, giving full effect to its provisions, and renouncing every right inconsistent with it." 2 Wms. Exrs., 1441; 1 Lead. Cas. in Eq., 303; 2 Smith Lead. Cas., 653; 2 Jarman on Wills, 7; 2 Redf. on Wills, ch. 14, § 69; 2 Story Eq. Jur., §§ 1077, 1085, 1087; *Hyde v. Baldwin*, 17 Pick., 308; *Smith v. Smith*, 14 Gray, 532. As the title of record at the death of the testator was in his name, both on the certificate of the forty shares and also on the books of the company, and as the will provides that the "devises and legacies given to the plaintiff" (not including these forty shares) "are in lieu of all claims upon my estate," and "all the rest, residue and remainder, of every name, nature and description, which shall belong to me in law or equity at the time of my decease" is given to "my three brothers," it follows as a necessary sequence that the title to these forty shares passed by the will to the three brothers, and therefore by these proceedings the plaintiff is not, as regards the will, "giving full effect to its provisions." She should therefore be estopped from claiming in derogation of the will.

LOOMIS, J. Our view of the facts renders unnecessary a discussion of several interesting questions presented by the arguments of counsel. We think the plaintiff's case may well rest upon the contract relations which the finding shows existed between her and the late Mr. Tyler in his life time. The plaintiff evidently made a great personal sacrifice and rendered most valuable services, relying upon the testator's promise to compensate her amply. It will be seen that the original contract contained no reference to a will. The plaintiff did not agree to wait till the testator's death. She accepted the proposal and commenced rendering services under the inducements held out of full compensation, without any mention of the time and mode of payment.

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More than five years elapsed, during which services were performed under this agreement before the testator suggested the making of his will, and then, after informing the plaintiff of certain specific bequests in her favor, he added that "he should do more for her from time to time"; and the assent of the plaintiff, which he then sought and obtained to this mode of compensation, had reference not only to the proposed bequests, but to the additional promise as well, and the latter clearly had reference to further compensation in the life time of the promiser, otherwise it could not be "from time to time." The transaction in question therefore was not void, as claimed by the defendants, because it was in the nature of a testamentary disposition.

In recognition of and in part fulfilment of his promise, the testator, about a year after the execution of his will, took the certificate for ten shares of the *Aetna* Life Insurance Company's stock, and handed it to the plaintiff, saying, "I give this to you," and when she tried to thank him he interrupted her by saying, "Show your thanks by doing for me." The plaintiff took the certificate and deposited it in the drawer of the safe, where she kept her own valuables.

Afterwards, in November, 1878, forty additional shares having been assigned to Mr. Tyler as the proportion of the surplus funds of the insurance company belonging to the ten original shares, he took the certificate for these forty shares and delivered it to the plaintiff, saying: "This *Aetna* Life Insurance stock of yours is good stock; it is all right; they give forty shares for ten; it is all the same, all the same as the ten shares; it is only a change in form and that is all; they have watered the stock; I paid nothing for it." The plaintiff took the certificate and deposited it in the drawer with the other. The court then, after finding the facts relative to the plaintiff's custody of the key to the safe, in the drawer of which these certificates were kept, adds, "that the said Tyler intended to vest in the plaintiff the ownership of the said ten shares and of the said forty

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shares of *Aetna* Life Insurance stock, and that both said Tyler and the plaintiff understood and from and after that time supposed that the plaintiff was the owner thereof, and the plaintiff received and retained possession of the certificates. And both parties supposed the said certificates of stock were in the plaintiff's possession while in the drawer of the safe. And I find that they were in fact. The plaintiff was ignorant of the details of business, and did not know that any steps were necessary to be taken to vest the legal title to the stock in her."

Now, is there any good reason why the plaintiff should be deprived of that which both parties intended she should have and for which she rendered an equivalent? It must of course be conceded that the legal title could not pass without a formal transfer on the books of the company, but we see no good reason why the equitable title as between the parties could not vest in the plaintiff under the circumstances referred to. The fact that one of the parties has deceased is no objection to the remedy sought, for it is a settled rule that equitable remedies exist to the same extent against executors and administrators as they did against the decedent. 2 Redfield on Wills, chap. 10, § 40.

The defendants claim that, under the law that obtains in this state, where the charter and by-laws of the corporation as in this case provide for a transfer only at the office of the company by the person named or his attorney on surrender of the certificate, no assignment can be valid, or have any effect for any purpose, unless made as prescribed; and in support of this proposition they cite *Marlborough Manf. Co. v. Smith*, 2 Conn., 579; *Northrop v. Newtown*, 3 id., 544; *Northrop v. Curtis*, 5 id., 246; and *Oxford v. Bunnell*, 6 id., 552.

In some of these cases statements may be found that furnish some support for the claim. But the scope and effect of these earlier decisions are explained and limited in the later case of *Colt v. Ives*, 31 Conn., 25, where HINMAN, C. J., in giving the opinion, says: "The attaching creditors, who are the real parties in interest in this cause,

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assume that, by a course of decisions in Connecticut, stock in a corporation is held to be so peculiar in its nature and character that no transfer can be made of it, or even any equitable interest acquired in it, as against attaching creditors, unless by an actual transfer made upon the corporation books, or recorded in them, in the mode prescribed by the charter or by-laws of the institution." Then, after citing the above cases, he adds: "These cases, and others to the same effect, being actions at law, conversant only with what at the time was considered the strict legal title to corporate stock, have necessarily no controlling force in a case depending upon equitable instead of legal principles."

If the equitable title could prevail, as it did in the case cited, as against the rights of attaching creditors, with much stronger reason, as it seems to us, should it prevail as between the immediate parties to the transaction and their representatives. We submit therefore that there is nothing in the present state of our law that prevents the adoption of the principles that obtain in other jurisdictions relative to the matter in question. These principles are well stated in Morawetz on Private Corporations, § 826, as follows: "While the consent of both parties to a contract is necessary in order to effect a novation, yet either party may bind himself by assigning to a stranger the right of enjoying his claims under the contract; and the interest of the assignees will be protected in equity as a trust, and may be enforced through the assignor. This principle has been applied in case of an assignment of shares in a corporation. A novation of the contract of the shareholders can be effected only in the manner prescribed by the charter; and an assignment of shares not executed in the manner required does not alter the relations existing between the assignor and the other members of the company. But the beneficial interest of a member may be transferred by any agreement which is binding between the parties to the assignment. A trust is thus created, and the equitable rights of the beneficiary will be protected and enforced by a court of equity."

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The following are some of the cases cited by the author, and they well sustain the above proposition: *Quiner v. Marblehead Ins. Co.*, 10 Mass., 476; *United States v. Cutts*, 1 Sumner, 133; *Stebbins v. Phoenix Ins. Co.*, 3 Paige, 350; *Gilbert v. Manchester Iron Co.*, 11 Wend., 627; *Nesmith v. Washington Bank*, 6 Pick., 324; *Sabin v. Bank of Woodstock*, 21 Verm., 353; *Conant v. Reed*, 1 Ohio St., 298; *Baltimore &c. R. R. Co. v. Sewell*, 35 Maryl., 252; *Perpetual Ins. Co. v. Goodfellow*, 9 Misso., 149.

In *Morgan v. Malleson*, L. Reps., 10 Equity Cases, 475, the testator gave to his medical attendant the following memorandum: "I hereby give and make over to Dr. Morris an India bond, No. 506, value £1,000, as some token for all his very kind attention to me during my illness. Witness my hand this 1st day of August, 1868. *John Saunders*." Now, although the legal title to this bond could be transferred only by delivery, and although it remained in the possession of Saunders and there was no consideration, yet the court, through Lord ROMILLY, M. R., said: "I am of opinion that the writing signed by Saunders is equivalent to a declaration of trust in favor of Dr. Morris. If he had said, 'I undertake to hold the bond for you,' or if he had said, 'I hereby give and make over the bond in the hands of *A*,' that would have been a declaration of trust, though there had been no delivery. This amounts to the same thing; and Dr. Morris is entitled to the bond, and to all interest accrued thereon."

If such instances are sufficient to constitute valid declarations of trust, it is difficult to see why the testator's expression—"This *Ætna* stock of yours is good stock; it is all right"—is not equally effective for that purpose.

But in the case at bar, in addition to declarations of trust we have an actual delivery of the certificates of stock with intention to pass the title and for a valuable consideration. In 3 Wait's Actions & Defenses, p. 491, it is said:—"The delivery of a note, bond, or certificate of stock, to a third person, with the intention to vest the right of property in the donee, (see *Dunbar v. Woodcock*, 10 Leigh, (Va.,) 628;

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McNulty v. Cooper, 3 Gill & J., 214; *Grover v. Grover*, 24 Pick., 261; *Stewart v. Hidden*, 13 Minn., 48;) or the execution of an instrument declaring an intention to make a present gift to him, or a declaration of trust in his favor, is enough to constitute a gift which a court of equity will uphold and enforce."

Our own court recognized the same principles in *Camp's Appeal from Probate*, 36 Conn., 88, by holding that the delivery of a savings bank book under the circumstances of that case constituted a complete gift of the deposits of the money therein referred to.

But it may be suggested that the principles invoked in favor of the plaintiff can only apply where there is a valid agreement between the parties established by competent evidence, and that the agreement relied upon in this case rests entirely on parol evidence, which was objected to and ought not to have been received.

Under the authority of *North v. Forest*, 15 Conn., 404, we concede that the statute may apply to a contract for the sale of shares of stock in a corporation, although the contrary is now the established doctrine of the English courts, where it is placed on the ground that the shares, being choses in action, are incapable of delivery. But, while adhering to our former decision, we may well recognize the peculiar nature of the property, and hold with courts of other jurisdictions, that the delivery of the certificate is a symbolical delivery of the stock, whereby the contract becomes executed, so as to vest the equitable title. *Ang. & Ames on Corporations*, § 564; *Howe v. Starkweather*, 17 Mass., 244; *Sargeant v. Franklin Ins. Co.*, 8 Pick., 98; *Wilson v. Little*, 2 Comstock, 443.

But there is an additional answer to the objection in this case arising out of the equitable grounds on which it rests. It is the accepted construction of the statute in courts of equity that, inasmuch as its design was to furnish protection against fraud, a party cannot take shelter behind its provisions, and thereby perpetrate a fraud on the other party, either actual or constructive.

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In this case not only did the testator vest the equitable title in the plaintiff, but he must be held to have agreed to give her the legal title as well. While he held it it was in trust for the plaintiff, and at his death the same trust was cast upon his personal representatives now before this court. Any attempt on the part of the testator in life to deprive the plaintiff of this stock would have been in fraud of her rights, and it is equally so on the part of his personal representatives.

But it is said that the plaintiff having accepted the provisions of Mr. Tyler's will so far as beneficial, the doctrine of election applies, and she is estopped from claiming anything inconsistent with the will. The principle that underlies this proposition is well settled, but we do not think it applies to the case under consideration.

The true test is, whether the provisions in the will are plainly inconsistent with the claims in this suit. This stock is not specifically devised to any other person. The view we have taken shows that it is no part of the estate of the deceased. The beneficial interest was wholly in the plaintiff before the will took effect. It does not therefore, as claimed, sink into the residuum of the estate, to enhance the portion of the testator's brothers. The plaintiff does not diminish the estate by taking back her own, and so this suit is not inconsistent with that provision in the will that makes certain legacies a bar to all claims upon the estate.

For these reasons the Superior Court is advised to render judgment that the defendants execute a transfer of the fifty shares of stock to the plaintiff.

In this opinion the other judges concurred.

Tolland County Ins. Co. v. Underwood.

THE TOLLAND COUNTY MUTUAL FIRE INSURANCE COMPANY vs. EMILY C. UNDERWOOD AND OTHERS.

A testator made the following bequest to his wife:—"I give to my wife *C* all the income of my estate, and so much of the principal as may be necessary for her support and the maintenance and education of my five daughters, during her natural life." The testator died two years later. A part of the property bequeathed was real estate of the value of \$3,400. Eight years later the plaintiffs obtained a judgment against *C*, the widow, for \$418, and recorded a judgment lien upon the real estate, and now sought to foreclose the lien. At this time the personal property had been exhausted and nothing remained but the real estate, which yielded an income of but \$200. Two of the daughters were dead, one was married, and two with the widow were dependent on the property for support. Held:—

1. That the widow took a life estate only in the land.
2. That she took this estate in trust.
3. That her interest, being inseparable from that of the daughters, and all the property being needed for her and their support, could not be taken upon a judgment against her.

SUIT to foreclose a judgment lien; brought to the Superior Court in Tolland County. The facts were found by the court and the case reserved for advice. The case is fully stated in the opinion.

M. R. West and *D. Marcy*, for the plaintiffs.

1. By the act of 1878 any real estate subject to an execution is subject to a judgment lien. The interest vested in the judgment creditor by such a lien is as permanent as a mortgage and of the same nature. *Beardsley v. Beecher*, 47 Conn., 408. And the lien may be foreclosed in the same manner as mortgages. Sec. 5 of the act. *Goodman v. White*, 26 Conn., 317. It is of no consequence just what the interest of the judgment debtor is, the court will foreclose it without defining it. *Williams v. Robinson*, 16 Conn., 517; *Wooden v. Haviland*, 18 id., 102; *Hill v. Meeker*, 23 id., 592.

2. Mrs. Underwood took a life estate in the land. *Larned v. Bridge*, 17 Pick., 339. And under the provision with regard to the use of the principal of the estate so far as

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necessary, she took a fee in so much of the land as should be thus needed. *Perry on Trusts*, §§ 113, 114, 117, 119; *Gilbert v. Chapin*, 19 Conn., 342; *Harper v. Phelps*, 21 id., 257; *Kellogg v. Mix*, 87 id., 243; *Foose v. Whitmore*, 82 N. York, 405.

3. But if the court should regard a trust as created by the will, then Mrs. Underwood's interest could still be taken for her debts. *Perry on Trusts*, § 116; *Davenport v. Lacon*, 17 Conn., 278; *Johnson v. Connecticut Bank*, 21 id., 148; *Easterly v. Keney*, 36 id., 18; *Sparhawk v. Cloon*, 125 Mass., 263; *Daniels v. Eldredge*, id., 356; *Nichols v. Eaton*, 91 U. S. Reps., 716.

C. Phelps, contra.

CARPENTER, J. A testator by a will executed in 1870, gave property to his wife as follows:—"I give and bequeath to my beloved wife, Emily C. Underwood, all the rents, profits and income of my estate, both real and personal, and so much of the principal as may be necessary for her support and maintenance, and the support, maintenance and education of my daughters, Ellen J., Lizzie G., Ada J., Annie H., and Miriam L. Underwood, for and during the natural life of my said wife Emily C." The testator died in 1872. A part of the property bequeathed was real estate.

The plaintiff in 1880 recovered a judgment against the said Emily C. Underwood for \$418.83, and filed a lien to secure the same, under the statute, upon the real estate devised to her. This suit is a proceeding to foreclose that lien. The Superior Court found the facts and reserved the case for the advice of this court. In the finding it appears that the personal property is practically exhausted and that the real estate remaining is now worth about \$3,400. Of the daughters named two are dead, one is married, and two remain dependent for their support and education upon the property so given.

The first question is,—what estate did the widow take in the property? We think she took a life estate only. Such

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appears to be the clear intention of the testator. It is given for life expressly. A life estate in express terms is not a fee simple in the lands remaining unsold. *Lewis v. Palmer*, 46 Conn., 454.

Did she take an estate in her own right, or in trust? In *Bristol v. Austin*, 40 Conn., 438, it was held that similar language, but identical in substance and meaning, raised a trust. A reference to that case and the authorities cited is all that is now necessary. The cases are not entirely harmonious, but the current of the authorities seems to be in that direction.

The next and principal question is,—did Mrs. Underwood take an attachable interest in the property? The general rule is that all one's property is liable for his debts. But to that rule there are many exceptions. All property exempt by statute from attachment is within the exception; so is ordinary trust property designed to secure a maintenance for some unfortunate debtor; so also the income of trust property where it is payable to the beneficiary at the discretion of the trustee. The exceptions indicate unmistakably that it is the policy of the law not to take from the debtor his means of subsistence—not to take from him his necessary daily food and clothing.

Now in this case the estate is small, barely sufficient to raise an annual income of two hundred dollars, out of which, except as the principal may be resorted to for that purpose, three persons are to be supported. While a court of equity will lend its aid to appropriate the surplus of trust funds, after affording a reasonable support to the *cestui que trust*, to the payment of his debts, yet we apprehend that it will not interfere to deprive a widow of a pittance, confessedly too small for her support, left by her husband for that purpose. In *Genet v. Beekman*, 45 Barb., 382, the marginal note is: "It is only in cases where a clear surplus will exist, after a reasonable sum has been appropriated to the support of the person for whose benefit a trust was created, that courts of equity are authorized to interfere in behalf of judgment creditors, and divert a portion of the

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income or annuity to the payment of the debts of such person."

Again: the interest of this mother, even if it was capable of separation, could not be separated from the interests of the daughters and transferred to creditors without seriously interfering with or entirely defeating the purposes of the trust. The supposed justice to creditors may and probably would work grievous injustice to third persons; and when such will be the result it requires no argument to show that a court ought not to interfere. But the interest of the widow is inseparable from that of the daughters. The income is small—clearly insufficient for their comfortable support—and some portion of the principal, how much the court was unable to find—will be required for that purpose. It is equally impossible to tell how much will hereafter be required for the support of the widow alone, or either of the daughters. Any one of the beneficiaries may at any time be in a situation to require the whole income. Under these circumstances it is impossible to fix upon any definite portion of the income and say that that shall be appropriated to the payment of the widow's debts. We are therefore disposed to approve the principle enunciated in *Ontario Bank v. Root*, 3 Paige, 482, so far at least as to apply it to a case in which the trust fund is as small as it is in the present case, that "the interest of a judgment debtor in a trust created partly for his benefit and partly for the benefit of another, cannot be taken on execution."

We advise judgment for the defendants.

In this opinion the other judges concurred.

CONSTANT L. TUTTLE *vs.* THE TOWN OF WINCHESTER.

The statute (Gen. Statutes, p. 232, sec. 10,) provides that any person, injured in person or property by means of a defective road or bridge, may recover damages from the party bound to keep it in repair; but that

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no action shall be maintained "unless written notice of such injury, and of the time and place of its occurrence, shall within sixty days thereafter be given." A notice was given to the selectmen of the defendant town as follows: "You are hereby notified that *C. T.* of the town of *B.* was injured in his person and property by reason of a defective highway and want of railing on its sides, located in said town of *W.*, and that this injury occurred on the 11th of September, 1879, on this highway, leading from the East Street Park, so called, in *W.*, past the old *G. H.* place to *N.*, and near the house of *P. M.* in said *W.*" Held to be sufficient both as to the place where the injury was received, and as to the character of the injury.

ACTION on the case for an injury from a defective highway of the defendant town; brought to the Superior Court in Litchfield County, and tried to the jury, on a general denial, before *Stoddard, J.* A verdict was returned for the defendants, and the plaintiff appealed to this court, on the ground of error in a ruling of the court. The case is fully stated in the opinion.

T. M. Maltbie, for the appellant.

A. H. Fenn, for the appellees.

PARK, C. J. The plaintiff seeks to recover damages from the defendants for injuries, which he claims to have received in his person and property, in consequence of the want of a sufficient railing by the side of a highway in the defendant town, which highway they were bound to keep in proper repair. On the trial of the cause in the court below the plaintiff offered in evidence the following written notice to the defendants, as a sufficient compliance with the statute on the subject:—

"To the Selectmen of the town of Winchester in Litchfield County.

"You are hereby notified that Constant L. Tuttle of the town of Barkhamsted in said county, was injured in his person and property by reason of a defective highway and want of railing by the sides of the same, located in said Winchester; and that this injury occurred on the 11th day

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of September, 1879, on this highway, leading from the East Street Park, so called, in Winchester, past the old Gideon Hall place to New Hartford, and near the house of Patrick McKee in Winchester. Dated at Barkhamsted this 12th day of September, 1879. CONSTANT L. TUTTLE."

The defendants objected to the notice as insufficient in regard both to the place and to the injury received, and the court rejected the evidence. This ruling of the court raises the only question in the case.

The statute with regard to the notice to be given in such cases, is as follows:—"Any person injured in person or property by means of a defective road or bridge, may recover damages from the party bound to keep it in repair; but no action for any such injury received subsequently to the seventh day of July, 1874, shall be maintained against any town, city or borough, unless written notice of such injury, and of the time and place of its occurrence, shall, within sixty days thereafter, be given to a selectman of such town, or to the clerk of such city or borough." Gen. Statutes, p. 232, sec. 10.

We will first consider whether the notice was sufficient in regard to the place where the injury is said to have occurred. In the case of *Shaw v. Town of Waterbury*, 46 Conn., 264, this court used the following language in regard to the object of the statute requiring notice to be given in such cases:—"The obvious purpose of this requirement is, that officers of municipal corporations, against which suits for injuries are about to be instituted, shall have such precise information as to time and place as will enable them to inquire into the facts of the case intelligently." It is obvious that in many cases exactness of statement as to place cannot be expected, for the excitement and disturbance caused by the accident as well as often the pain which a person injured suffers, make it impossible to observe with any carefulness the place where the accident occurs, and often the person injured is unable to revisit the place within the time allowed by the statute for the giving of notice. In such cases reasonable definiteness is all that can be expected

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or should be required. If the description of the place will enable the town, city or borough, through its proper officers, to ascertain the place by the exercise of reasonable diligence for the purpose, it will be sufficient.

We do not understand that the cases cited by the defendants from Vermont and Massachusetts conflict with this doctrine. In the case of *Holcomb et ux. v. Danby*, 51 Verm., 428, the court say that the place must be described in the notice "with reasonable particularity." In the case of *Larkin v. Boston*, 128 Mass., 521, the court say that "there can be no doubt that the legislature, in requiring the party to be notified of the place, intended such notice of the locality as to enable the precise spot where the injury was received to be ascertained with substantial or reasonable certainty;" and that the circumstances of a particular case may be such that "the name of the street, alley, or court, would designate the spot where the injury was received, with substantial or reasonable certainty." This was said in a case where the defect which caused the injury was in the road-bed itself, a mere place, with nothing to distinguish it. Much more might it be said in a case like this, where the defect extended along the highway for a considerable distance, and could readily be discovered; for it consisted in the want of a railing by the side of the highway, where the road-bed was so raised above the adjoining ground as to require it. In such a case it was not so important to the town to know the precise spot along the defective way where the plaintiff went off the road and down the embankment with his horse and carriage. The notice describes the place where the accident occurred as being on the highway, near the house of Patrick McKee in the town of Winchester, where the highway is defective from the want of a railing. It does not appear that the highway was defective for this cause at any other place in that vicinity. If it had been the defendants would have been very ready to show it. Suppose the notice had described the place as being on the highway near the house of McKee where there was a huge boulder by the side of the highway; and no other

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boulder answering the description could be found in that vicinity; would not the description be sufficient? And would the description be more precise in pointing out the defect than it is here? And further, the plaintiff says by his notice that he was injured in his person and property by going off the highway at the place described; giving the defendants to understand thereby that he went off with a horse and carriage. The notice was given to the defendants the day after the injury occurred. If the defendants had gone to the place described within a reasonable time after receiving the notice, the marks upon the ground, in connection with the notice, would have informed them of the precise spot where the plaintiff went down the bank and received his injury. We think the notice is sufficient so far as the description of the place where the injury occurred is concerned.

Is it sufficient in describing the injury received? The statute provides that "any person injured in person or property by means of a defective road or bridge, may recover damages from the party bound to keep it in repair." He may therefore recover some damage for an injury thus received, however slight it may be. The notice states that the plaintiff was injured in his person and property. There may be actionable injuries to which no other description can be given. Oftentimes serious injuries do not develop themselves until long after they are received. But the statute is entirely silent in regard to the statement of the injury in the notice. The defendants contend that the words "such injury," as used in the statute, have reference to the character of the injury received, and require that the injury should be particularly described in the notice; but clearly these words refer solely to the manner in which the injury was received, namely, by means of a defective road or bridge. This appears from the context, which is "but no action for any such injury [that is, the injury previously described, arising from a defective road or bridge] shall be maintained, * * * unless written notice of such injury * * * shall be

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given." Manifestly the two phrases in the same sentence have the same meaning. We think the written notice in this case contains all that the statute requires.

The decisions in the states of Vermont and Massachusetts are based upon statutes very different from our own in this respect, and therefore they throw no light upon the present inquiry.

We think there is error in the judgment appealed from, and it is therefore reversed and a new trial ordered.

In this opinion the other judges concurred.

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SAMUEL E. FAIRFIELD, EXECUTOR, vs. EDWIN N. LAWSON AND OTHERS.

A testator gave certain property to a trustee, for the use of his widow during her life, and after her death "the income to be devoted to the education of the freedmen, and paid over annually to the proper officers of the Freedmen's Association for that purpose by the trustee." The term "freedmen" was one generally applied to the lately emancipated slaves and their descendants. There were numerous organizations which had for their object the education of these people, but no one which bore the name of Freedmen's Association. Held—

1. That evidence that the testator told the scrivener who drew the will that he wanted to give the income of the property in trust for the education of the freedmen, and that there was a freedmen's association organized by the Methodist church people in Cincinnati, and that he wanted it payable to the officers of that association, was inadmissible.
2. That the trustee could not appropriate the income for the education of the freedmen as a class.

The power given the trustee was merely to pay the income to the proper officers of the Freedmen's Association. The court could not prescribe an additional duty without making an addition to the will.

Besides, the freedmen were several millions in number, and no power was given to the trustee, or to any one, to select the individuals who should receive the benefit. Every individual would therefore have a right to share in the bounty, and it would be impossible to administer the trust.

If a charity does not fix itself on a particular object, but is general and indefinite, and no plan is prescribed and no discretion given in the will for the selection of the beneficiaries, it does not admit of judicial administration.

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Under the rule which admits parol evidence in cases of ambiguity, to aid in the construction of a will, it is necessary that the words of the will should describe accurately the subject or object of the gift, and that the parol evidence should go only to show which of certain properly described subjects or objects was intended.

Another item in the same will was as follows: "I give to my executor all my real estate, to be sold, and the proceeds held in trust for the education of the freedmen, and the income to be paid by him to the proper officers of the Freedmen's Association, or disposed of as he pleases."

Held—

1. That the trust adhered to the proceeds in the hands of the executor, even though the trust failed as to the Freedmen's Association.
2. That it became then a gift upon trust, with no provision as to who should take the benefit of it, and therefore could not be carried out.
3. That the fund became intestate estate, and that the executor took nothing personally.

SUIT asking for the construction of a will; brought to the Superior Court in Tolland county. The following facts were found by the court:—

David Lawson, the testator, died February 10th, 1881, leaving real estate of the value of \$12,000 and personal estate of the value of \$9,688. He left a will, made in 1868, which was proved after his death, and which contained the following clauses:

"I give unto William M. Corbin three thousand three hundred and fifty dollars, in trust for my wife, Polly Lawson. Said trustee shall pay her the interest of said sum of money in manner following * * so long as she shall live. And from and after the death of my said wife, the interest shall be used and employed and devoted to the education of the freedmen, and the interest shall be paid over annually to the proper officers of the Freedmen's Association for that purpose by the said trustee.

"I devise unto my executor hereinafter named, all of my real estate in whatever place situated, the same to be sold by him after my decease, and the proceeds to be held by him in trust for the education of the freedmen, and the annual interest and income arising from the same to be paid by him to the proper officers of the Freedmen's Association, or to be disposed of and used as he pleases.

"I give unto my executor hereinafter named all the rest

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and residue of my estate, to be disposed of by him in manner following: that is to say, the sum of five hundred dollars to be expended in erecting a suitable monument over my grave; and after the payment of expenses of settling my estate, the remainder shall be held in trust by my said executor for the education of the freedmen, and the interest shall be paid over annually to the proper officers or persons of the Freedmen's Association by my said executor.

"I do hereby constitute and appoint Samuel E. Fairfield, Esq., executor of this my last will and testament."

At the date of the execution of the will and at the time of the death of the testator there had not been established any voluntary association nor any corporation known as the "Freedmen's Association." There were, however, in existence at the first mentioned date divers associations, organized for and engaged in the work of educating the freedmen. "The Hartford Freedmen's Aid Society," a voluntary association, was organized for that purpose in June, 1865, and continued in the work until June, 1869, when it ceased to exist. "The New England Freedmen's Aid Society," another voluntary association, located at Boston, Mass., was also then in existence and continued in that work until 1871, when it ceased to exist. There was also "The Freedmen's Bureau," organized under the laws of the United States, March 3, 1865. This organization ceased to exist long before the death of the testator. There was also in existence at the date of the execution of the will, "The American Missionary Association," a body corporate by the laws of the state of New York, incorporated in 1849, for the purpose of sending the gospel to the destitute in our own and other countries, but at said date they were actively engaged and ever since have been and still are in the work of educating the freedmen as well as preaching the gospel to them.

At the date of executing the will there was also a voluntary association of individuals connected with the Methodist Episcopal Church engaged in the work of educating the freedmen, known by the name of "The Freedmen's Aid

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Society of the Methodist Episcopal Church, located at Cincinnati, Ohio." This was organized August 8th, 1866, and continued to exist as a voluntary association until November 17, 1870, when it ceased to exist as a voluntary association, and upon application of its members a corporation was organized under the laws of the state of Ohio under the same name and located at the same place. The object of the voluntary association, as stated in its articles of agreement, was—"to labor for the relief and education of the freedmen, especially in co-operation with the Missionary and Church Extension societies of the Methodist Episcopal Church." In its constitution or articles of incorporation the object is stated in the same words except that after the word "freedmen" are added the words "and others." The articles for the government of the voluntary association were not identical with, but in some respects radically different from those of the corporation. The former was under the control of a board of managers, consisting of the bishops of the Methodist Episcopal Church, two persons, one minister, and one layman, named by any annual conference organizing an auxiliary society, together with certain persons, thirty-six in all, named, and such others as might be thereafter elected at any quarterly or annual meeting of the society, while the corporation was to be governed by a board of directors (nineteen persons being mentioned), and their successors, who were to be elected annually. Since the organization of the corporation it has been and still is actively engaged in the work of educating the freedmen.

Neither the latter organization nor any other voluntary association or corporation has appeared and claimed the legacies mentioned in the will, payable to the proper officers of the "Freedmen's Association," although the officers of the "Freemen's Aid Society of the Methodist Episcopal Church" have had notice of the terms of the will and of the pending litigation.

There was no evidence whatever before the court to show that the last mentioned organization was intended by the

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testator, except his verbal declarations as hereinafter mentioned.

The plaintiff offered Samuel E. Fairfield as a witness, who testified that he drew the will in question at the dictation of the testator, who said he wanted to give the income of the property in question in trust for the education of the freedmen, that there was a Freedmen's Association organized by the Methodist Church people, located in Cincinnati, Ohio, and that he wanted it payable to the officers of that association.

This evidence was received subject to the defendants' objection. If legally admissible for the purpose, the court finds that wherever in the will the testator refers to the "Freedmen's Association" he intended the voluntary association known by the name of "The Freedmen's Aid Society of the Methodist Episcopal Church," located at Cincinnati and organized August 8th, 1866.

If, on the other hand, the verbal declarations of the scrivener are not admissible or competent to prove the fact above stated, then I find that there is no evidence whatever to identify the object of the testator's bounty, described as the Freedmen's Association, and it is impossible for the court to determine it.

The court further finds that the term "freedmen," as used in the will, refers to that class of persons in the United States who were emancipated from slavery during our late civil war or by its results, and embraces also the descendants of such persons.

Upon these facts the following questions were reserved for the advice of this court:—

1. Whether the declarations of the testator were admissible for the purpose stated? And if so,
2. Whether the corporation entitled "The Freedmen's Aid Society of the Methodist Episcopal Church," located at Cincinnati, Ohio, can take the legacies specifically intended by the testator for the voluntary association of the same name existing when the will was executed?
3. Whether, if for any reason that corporation cannot

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take, the trustees named in the will (or others to be appointed by the court for the purpose) can rightfully use and appropriate the income for the education of the freedmen, as constituting a definite class of persons?

4. Whether the devise of the proceeds of the sale of the real estate in the second item of the will is so expressed as to vest the real estate or the proceeds thereof absolutely in Samuel E. Fairfield in fee, or whether the devise is for any reason void in whole or in part?

5. Whether any clauses or provisions in said will, and if so, which ones, are void for uncertainty, inconsistency, or for any other cause?

M. R. West and *E. B. Sumner*, with whom was *S. E. Fairfield*, for the plaintiff.

1. The instructions of the testator to the scrivener, at the time the will was drawn, were admissible. 1 Redf. on Wills, 272, 496, 577; 1 Jarman on Wills, 748; *Cheyney's Case*, 5 Coke, 68; *Beaumont v. Fell*, 2 P. Wms., 141; *Thomas v. Thomas*, 6 T. R., 671; *Brewster v. McCall's Devisees*, 15 Conn., 274; *Ayers v. Weed*, 16 id., 291; *Am. Bible Society v. Wetmore*, 17 id., 181; *Dunham v. Averill*, 45 id., 61, 68; *Tucker v. Seamen's Aid Society*, 7 Met., 188; *Trustees v. Peaslee*, 15 N. Hamp., 317; *Wagner's Appeal*, 43 Penn. St., 102; *Woods v. Moore*, 4 Sandf., 579.

2. The Freedmen's Aid Society of Cincinnati can take the legacies given to the "Freedmen's Association." Powell on Devises, 421; *Brewster v. McCall's Devisees*, 15 Conn., 274, 292; *Ayers v. Weed*, 16 id., 291, 299; *Am. Bible Society v. Wetmore*, 17 id., 181, 186; *White v. Howard*, 38 id., 342.

3. If that society can not take the legacies, then the trustees can rightfully appropriate the income of the property for the education of the freedmen as a definite class of persons. 2 Swift Dig., 111; 2 Redf. on Wills, 818; Perry on Trusts, 407; *Bull v. Bull*, 8 Conn., 47; *Am. Bible Society v. Wetmore*, 17 id., 181, 188; *Treat's Appeal from Probate*, 30 id., 113; *White v. Howard*, 38 id., 342; *Adye v. Smith*, 44 id., 60; *Burbank v. Whitney*, 24 Pick., 146; *Bartlett v.*

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Nye, 4 Met., 378; *Wells v. Doane*, 3 Gray, 203; *Bliss v. Am. Bible Society*, 2 Allen, 334; *McAllister v. McAllister's Heirs*, 46 Verm., 272; *Chambers v. City of St. Louis*, 29 Misso., 543; *Hopkins v. Upshur*, 20 Tex., 89.

4. The devise of the proceeds of the sale of the real estate vests the real estate or the proceeds of its sale absolutely in Fairfield, the executor. 1 Swift Dig., 141; 3 Washb. R. Prop., 695; 4 Kent Com., 319; 1 Redf. on Wills, 175; 2 id., 707, 732; *Ingersoll v. Knowlton*, 15 Conn., 468; *Hull v. Culver*, 34 id., 403; *McKenzie's Appeal from Probate*, 41 id., 607; *Guthrie v. Wheeler*, 42 id., 285, 292; *Lewis v. Palmer*, 46 id., 454; *Maltby's Appeal from Probate*, 47 id., 349; *Jackson v. Coleman*, 2 Johns., 391; *McDonald v. Wal-grove*, 1 Sandf. Ch., 274; *Ide v. Ide*, 5 Mass., 500; *Reed v. Reed*, 9 id., 372; *Wells v. Doane*, 3 Gray, 201; *Bacon v. Woodward*, 12 id., 376; *Musselman's Estate*, 39 Penn. St., 469; *Ralston v. Telfair*, 2 Dev. Eq., 255; *Ramsdell v. Ramsdell*, 21 Maine, 288, 293; *Gibbs v. Rumsey*, 2 Ves. & B., 294.

A. P. Hyde and *D. Marcy*, for the defendants.

1. Evidence of the declarations of the testator as to his intention in the gift to the "Freedman's Association" is clearly inadmissible. The case does not fall within any rule under which such declarations are admitted. *Dunham v. Averill*, 45 Conn., 61; *Ackworth v. Benton*, 18 Weekly Reporter, 988; S. C., 22 Law Times, N. S., 776; Wigram on Wills, part 1, §§ 180 to 184; id., part 2, § 15.

2. The trustees have no power under the will to apply the income of the property to the education of the freedmen as a class. Their sole duty and power in the matter is to pay over the income to the proper officers of the Freedmen's Association. Besides, such an administration of the charity among the millions of the freedmen would be impossible. *White v. Fisk*, 22 Conn., 31; *Treat's Appeal from Probate*, 30 id., 113; *Cram v. Bliss*, 47 id. 592; *Grimes's Exrs. v. Harmon*, 35 Ind., 198; *Am. Tract Society v. Atwater*, 30 Ohio St., 77.

3. Fairfield takes no personal interest under the clauses

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in question. If the bequests fail, the property becomes intestate estate. 1 Jarman on Wills, 680; 2 Story Eq. Jur., § 979 b; *Morice v. Bishop of Durham*, 10 Ves. Jr., 527; *Gibbs v. Rumsey*, 2 Ves. & B., 296; *Fowler v. Garlike*, 1 Russ. & M., 232; *Wheeler v. Smith*, 9 How., 79; *Saylor v. Plaine*, 31 Maryl., 158; *Nichols v. Allen*, 130 Mass., 211; *Adye v. Smith*, 44 Conn., 60.

LOOMIS, J. Those parts of the will of David Lawson that are so obscure as to require the advice of this court relate to the bequests to the Freedmen's Association and to Fairfield to be used as he pleases.

1. Who can take the legacy payable to the proper officers of the "Freedmen's Association"? We cannot advance a single step toward the solution of this question unless resort may be had to parol evidence, because the record shows that there was no such organization or corporation in existence as the Freedmen's Association at the date of the execution of the will; and this expresses but a small part of the difficulty, for the further finding is that except a single item of parol evidence, the admissibility of which is one of the questions reserved, there was absolutely no evidence of any kind to identify the object of the testator's bounty.

The evidence in question consisted merely of the oral instructions given by the testator to the scrivener, Fairfield, "that he wanted to give the income of the property in question in trust for the education of the freedmen; that there was a Freedmen's Association organized by the Methodist Church people located in Cincinnati, Ohio, and that he wanted it payable to the officers of that association."

Now it is very common to admit parol evidence in cases for the construction of wills. The difficulty here is not owing merely to the fact that the evidence is oral, but to its relation to the written words of the will. The law is imperative that the entire will must be in writing, and herein are found the rules and limitations that must be applied to such evidence. The intent must in every case

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be drawn from the will, but never the will from the intent. The test therefore to be applied in all cases where evidence like that under consideration is tendered, is, whether there appears on the face of the will sufficient indication of intention to justify the application of the evidence. The words of the will are so controlling that if they apply with exactitude to one person, such person will take the legacy, although parol and extrinsic evidence might make it perfectly clear that another person less exactly described was the one intended.

This principle was applied by this court in the recent case of *Dunham et al. v. Averill et al.*, 45 Conn., 61, where the legacy was to "The American and Foreign Bible Society," and it appeared that that society was one mainly supported by the Baptist denomination; but that there was another society supported by the Congregational and Presbyterian denominations, named the "American Bible Society," sometimes called "The American and Foreign Bible Society," and that the testator's sympathies and preferences were all with the latter; and evidence was offered that while the will was being drawn the testator said to the scrivener that he wished to give the money to the Bible Society sustained by the Congregationalists and Presbyterians; that he was not sure as to its corporate name, but believed it to be "The American and Foreign Bible Society"; but the evidence was held not admissible. So it has been uniformly held that parol evidence cannot be received to correct a mistake in the will. *Avery v. Chappel*, 6 Conn., 270; *Comstock v. Hadlyme Ecc. Society*, 8 id., 254; *Tucker v. Seamen's Aid Society*, 7 Met., 188; *Jackson v. Sill*, 11 Johns., 201.

The principle we are contending for is also applied in another class of cases, where parol and extrinsic evidence is admitted. I refer to the rule derived from the maxim, "*Falsa demonstratio non noeet, cum de corpore constat*," where the office of the parol evidence is to reject that part of the description which is false, but in such case it is indispensable that enough remains in the *words of the will* to show plainly the intent, but in no case can any words be added to the description.

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Another prominent rule is, that when the question is one of construction the parol or extrinsic evidence must be ancillary to a right understanding of the language of the will; hence all direct evidence of intention as contra-distinguished from evidence to show the meaning of the written words in the will is inadmissible. This rule is well illustrated by the case of *Goblet v. Beechey*, given at length in the second American edition of Wigram on Extrinsic Evidence, p. 287, Appendix, and also briefly reported in 3 Simons, 24. Nollekins, the sculptor, by a codicil to his will desired that "all the marble in the yard, tools in the shop, bankers, mod., tools for carving, &c., should be the property of the plaintiff. A lady who was an attesting witness was offered to prove that before she subscribed her name she read the codicil in the hearing of the testator, and when she came to the word "mod" she asked him what he meant by it, and he replied "models." Sir JOHN LEACH, Vice Chancellor, held the testimony inadmissible, but allowed an inquiry as to the meaning of the term itself from the testimony of sculptors. See also cases referred to in 2 Phillips's Evidence, (Cowen & Hill's notes) p. 754.

So far the rules referred to, if applied to the evidence in question, rigidly exclude it. Is there then any exception or additional rule under which it may be received? The case shows that it was sought for the purpose of ascertaining the beneficiary, to prove the specific intention of the testator by his oral declarations to the scrivener who drew the will. There is only one rule that can be invoked as applicable to such a case. This is stated very clearly by Lord ABINGER, Chief Baron, in *Hiscocks v. Hiscocks*, 5 Mees. & Wels., 368, whose opinion, Redfield says, in his Treatise on Wills, vol. 2, p. 566, is universally admitted to have settled the law that such evidence is only admissible in the one instance there stated, namely, "where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is, on the face of it, perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or

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more persons, *each answering the words in the will*, the testator intended to express. Thus, if a testator devise his manor of *S.* to *A. B.* and has two manors of *North S.* and *South S.*, it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord BACON calls ‘an equivocation,’ that is, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us that, in all other cases, parol evidence of what was the testator’s intention ought to be excluded, upon this plain ground, that his will ought to be made in writing, and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will.”

Now it seems to us that under this rule the proposed evidence cannot apply, because the words of the will describing the beneficiary do not apply equally to two or more, “each answering to the words of the will.” On the contrary the words used are not applicable to any known organization, either voluntary or incorporated. Such in substance is the finding. When therefore we learn from the parol evidence what the actual intent was, we do not “immediately perceive that the testator has effectuated his intent by the general words he has used;” on the contrary, the effect of the evidence in this case is rather to increase the mystery that hangs over the words in the will. The name “Freedmen’s Association” in itself considered would naturally import an association composed of freedmen, as the names “Lawyers’ Association,” “Doctors’ Association,” “Farmers’ Association,” would indicate the membership of each.

It is very strange, if the testator gave such instructions to the scrivener as the evidence indicates, that no one of the prominent features of his description should find its way into the will as written. The prominent things in his description were, the religious body that organized the asso-

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ciation and its location at Cincinnati, Ohio, but of these things the words of the will are silent, and it does not appear how or why the words "Freedmen's Association" alone were used; there was no discussion concerning the name; no suggestion that the name used would be sufficient, nor that the Cincinnati society had ever been so called. As the case stands upon the record the instructions given by the testator were not carried into effect by the scrivener, and the court has no power to correct the mistake, as it would upon like evidence correct a mistake in a contract. We should be virtually making a will as to the beneficiary from the actual intent proved only by parol.

We have not deemed it necessary to review the numerous cases bearing upon this question. While there is now substantial harmony among the courts concerning the abstract principles that apply, there is, it must be confessed, considerable diversity in their application. We have therefore preferred to test the somewhat extraordinary features of this case by a pretty strict application of the principles of evidence and construction, and our conclusion is that the parol evidence cannot be received for the purpose of showing that the legacy in question is payable to the officers of "The Freedmen's Aid Society of the Methodist Episcopal Church located in Cincinnati, Ohio;" and it is pleasant to know that this society will not be disappointed by this result, for it appears that, although they well knew the terms of the will and the fact of the pending litigation, yet they have never claimed the legacy in question.

2. The next question is, whether the trustees named in the will, (or others to be appointed by the court for the purpose,) can rightfully use and appropriate the income for the education of the freedmen as constituting a definite class of persons?

It is contended that, as the purpose and object of the bequests under consideration are the education of the freedmen, who constitute a definite class of persons, the charity will not be suffered to fail for the want of a competent agent to administer it. If this were the only difficulty in

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the case it might easily be overcome, for there is no doubt that the court can supply the want of a trustee. There is in fact no such want here. Corbin and Fairfield are named as trustees. But in each of the clauses where bequests are made for the education of freedmen the trustees have no discretion given them in the will. On the contrary, all discretion is taken away by the express direction to pay the income over to the proper officers of the Freedmen's Association. When they have performed this duty there is nothing left for them to do under the will, and the court cannot prescribe an additional duty without in effect making an addition to the will. But it is argued that the freedmen are the *cestuis que trust*, and that if the trustees only pay the money for their education it effectuates the intention of the testator as indicated in the will; that the certainty required is only to point out the class, no matter how indefinite may be the particular recipients of the benefit within that class. It is found that the term "freedmen," as used in the will, refers to that class of persons who were emancipated during the late civil war and their descendants. As matter of common knowledge we may be permitted to say that the numbers composing this class are now about six millions. Of all these, only a very few individuals could by any possibility receive any of the benefits contemplated by the will. It is not within the range of probability that different individuals or corporations, separately charged with the duty of disbursing the testator's bounty, would so perform it as to benefit the same individuals of the class. A change therefore in disbursing agents, or a change in the mode of selecting beneficiaries, not provided for in the will, constitutes in effect a change of the bequest. Hence, in addition to a definite class it is indispensable that the will itself should prescribe some mode of selection, or give to some person a discretionary power to select; in short, a will must be executed in the way and manner which the testator provides, and if, owing to the indefiniteness of the object or the mode provided, this cannot be done, then the subject of the trust is not disposed of, but results to the benefit of those to

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whom the law gives the property in the absence of a valid will.

The cogent reasoning of BUSKIRK, J., in giving the opinion in *Grimes's Exrs. v. Harmon et al.*, 35 Ind., 198, furnishes most ample support for the positions we have taken in this discussion. In that case the bequest was "to the Orthodox Protestant Clergymen of Delphi, and their successors, to be expended in the education of colored children, both male and female, in such way and manner as they may deem best, of which a majority of them shall determine; my object being to promote the moral and religious improvement and well-being of the colored race." The court, after a most exhaustive and able review of all the authorities, held that the legacy was void for vagueness and uncertainty; placing the decision upon the following propositions, among others,—that the testator intended that his beneficiaries should be selected from the children of the colored race residing within the United States; that the persons composing the class were very numerous and as each one had a beneficial interest in the fund it would be utterly impossible to execute the trust; that under the will as construed by the court the trustees had no power or discretion to select the beneficiaries from the class designated; that there is no difference in principle whether a devise be immediate to an indefinite object, or to a trustee for the use and benefit of an indefinite object; that if it be immediate, to an indefinite object, it is void, and if it be a trust for an indefinite object, the property that is the subject of the trust is not disposed of, and the trust results to the benefit of those to whom the law gives the property in the absence of any other disposition of it; and that if a charity does not fix itself on a particular object, but is general and indefinite and no plan or scheme is prescribed and no discretion is given in the will to select the beneficiaries, it does not admit of judicial administration.

3. The remaining question relates to the construction of item second of the will, which reads as follows: "I do give, devise and bequeath unto my executor hereinafter

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named, all of my real estate in whatever place situated, the same to be sold by him after my decease, and the proceeds to be held by him in trust for the education of the freed-men, and the annual interest and income arising from the same to be paid by him to the proper officers of the Freed-men's Association, or to be disposed of and used as he pleases."

The construction of this clause of the will, we think, must depend on the question whether the idea of a trust adheres to the proceeds in the hands of the executor to the last, whether he pays it over to the officers of the Freed-men's Association or exercises his own pleasure and discretion as to whom it may be paid to, or whether the trust drops out altogether at the commencement of the alternative clause, so that the bequest was either a trust or no trust at the will of Fairfield.

We think the first is the better construction. In the first place we think, if the testator had intended a personal gift to Fairfield, as he was a lawyer, and was employed to draft the will, and was made executor to administer it, that if he had so understood it the terms of the will would have been more explicit, for it would have occurred to both that such a gift, covering as it did the principal part of the estate, would necessarily excite the suspicions of the disinherited heirs, who would desire to defeat it. And in the next place, we think the language used indicates that the testator intended to stamp all this property with a permanent trust. The bequest is not to Fairfield by name, but to his executor, and the testator expressly says that the proceeds of the sale of all the real estate are to be held in trust by the executor, and then follows a statement of the purposes.

Upon this construction is the trust one that can be enforced? Lord LANGDALE, in *Knight v. Knight*, 8 Beavan, 148, 174, defining the certainty required to create a valid trust, says:—"Any words by which it is expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain. And a

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vague description of the object, that is, a description by which the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the objects from being certain within the meaning of the rule." In 1 Jarman on Wills, (5th Am. ed.,) p. 680, it is said that "if the gift be expressly in trust, though to be disposed of in such manner and for such purposes as the devisees think fit, they are trustees, and the beneficial interest results to the heir or next of kin, and a gift 'to be expended and appropriated in such manner as the donees or a majority of them shall in their discretion agree upon,' would probably without the words 'in trust' produce the same result, for technical language of course is not necessary to create a trust. It is enough that the intention is apparent." Citing *Fowler v. Garlike*, 1 Russell & Mylne, 232; *Buckle v. Bristow*, 10 Jur. (N. S.), 1095; *Gibbs v. Rumsey*, 2 Ves. & B., 292. See also *Wheeler v. Smith et al.*, 9 How., 79. In *Morice v. Bishop of Durham*, 10 Ves. Jr., 526, Lord ELDON says:—"If a testator expressly says he gives upon trust, and says no more, it has been long established that the next of kin will take. Then, if he proceeds to express the trust, but does not sufficiently express it, or expresses a trust that cannot be executed, it is exactly the same as if he had said that he gave upon trust, and stopped there."

We therefore advise the Superior Court that the oral declarations are inadmissible for the purpose claimed; that "The Freedman's Aid Society of the Methodist Episcopal Church located at Cincinnati, Ohio," cannot take the legacy given to the Freedmen's Association; that the bequests to the freedmen as a class are void for uncertainty; and that Fairfield takes nothing under the will.

In this opinion the other judges concurred.

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ERASTUS D. GOODWIN *vs.* LEE P. DEAN.

The defendant, as an attorney-at-law, drew a mortgage of certain real estate to *R*, which was executed by *H* in his presence, he signing his name as a witness and taking the acknowledgment as a magistrate, and fully understanding the contents of the deed. Nine years later the defendant took a mortgage from *H* to himself of the same real estate. The first mortgage had never been put on record. Held that the law would not presume that the defendant, at the time he took his own mortgage, continued to have the knowledge of the prior mortgage which he had nine years before.

A case of this sort, where the knowledge was merely casual, and with nothing to impress the fact upon the mind, is very different from a case where there is a duty upon the party to remember, or the notice is of a fact affecting his interests.

SUIT for a foreclosure; brought to the District Court of Litchfield County. Facts found by a committee and judgment rendered by the court (*Warner, J.*,) for the plaintiff. Appeal to this court by the defendant. The case is sufficiently stated in the opinion.

A. T. Roraback and L. J. Nickerson, for the appellant.

A. H. Fenn and D. T. Warner, for the appellee.

CARPENTER, J. This is an action to foreclose a mortgage. The mortgage was given May 27th, 1867, and not recorded till March 22d, 1877. On the 1st of April, 1876, the defendant took a mortgage covering the same property, and in October following took another mortgage, both of which were recorded in a reasonable time. The plaintiff insists that his mortgage should have the preference on the ground that the defendant took his mortgages with knowledge of that of the plaintiff.

The finding shows that the defendant, who is an attorney-at-law, was the scrivener who drew the mortgage deed which the plaintiff now owns, was a witness to it, and was the magistrate who took the acknowledgment. It is also

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found expressly that at that time the defendant had full knowledge of that mortgage, but there is no express finding that he had such knowledge nine years later when he took his own mortgages. Upon these facts the District Court sustained the plaintiff's claim and rendered a judgment in his favor.

The defendant claims that the ruling of the court was erroneous, and that is the sole question presented by this appeal. On this subject STORY says:—"This doctrine, as to postponing registered to unregistered conveyances upon the ground of notice, has broken in upon the policy of the registration acts in no small degree; for a registered conveyance stands upon a different footing from an ordinary conveyance. It has, indeed, been greatly doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance. But they have said that fraud shall not be permitted to prevail. There is, however, this qualification upon the doctrine, that it shall be available only in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of the other party." 1 Story's Eq. Jur., § 398.

We do not think the circumstances of this case bring it within the doctrine as thus stated. The committee carefully refrained from finding that the defendant knew, when he took his mortgages, that the plaintiff's mortgage was then outstanding. Without such knowledge there was no fraud. The fact that he knew of the plaintiff's deed nine years before is not equivalent to knowledge then, as there is no legal presumption that such knowledge continued for a period of nine years so as to charge the party with fraud. When the defendant wrote that deed he had no interest in the premises, and had no occasion to charge his mind with it. Drawing deeds is a part of the ordinary business of a practicing attorney, and something that he may have occasion to do several times in a day. If any man should remember the details of a single transaction of the kind for nine years it

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would be a remarkable instance of a retentive memory. It is certainly not to be expected as a common thing. No principle of law is founded on an assumption that that will happen which seldom or never does happen. Legal principles are not only general rules, but they are in the main founded upon general rules and not upon exceptions; that is, upon the presumption that that will be done in a given case which men ordinarily do under similar circumstances. The law will not require any man to do what hardly one man in a thousand is capable of doing. Therefore the law will not presume that the defendant, when he took his mortgages, had in mind the fact that nine years before the mortgagor mortgaged the same property to a third party. If he did not have it in mind he is not in any proper sense chargeable with knowledge. If there was no knowledge there was no fraud, and, if no fraud, the defendant's equities are prior in right and must prevail.

The plaintiff's argument assumes that the defendant's case depends upon the presumption that he had forgotten the circumstance. It is not a mere question of forgetfulness; the question is whether he had forgotten anything that he ought to have remembered. Unless he was under some obligation to remember he is not chargeable with negligence in not remembering. The law imposed no duty upon him and his interests did not require it.

If, while contemplating taking a mortgage on this property, he had been informed that the plaintiff's mortgage was still outstanding, it would have been his duty to remember it. Due regard to his own interests and to the rights of others required him to remember it, and the law might properly impute knowledge to him; because the law supposes that a man will act with due regard to his own interests, and requires him to act with due regard to the rights of others. A failure to do so would evince a willingness, if not a desire, to defraud his neighbor, or at least to get an advantage over him which would be inequitable and unjust. Nothing of the kind appears in this case.

In addition to these considerations there are some pre-

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sumptions founded on the common experience of mankind which are in the defendant's favor. There is the ordinary presumption on which the statute of limitations is founded, that an ordinary debt will be paid in six years. The plaintiff's debt was overdue nearly eight years when the defendant took his first mortgage. Then the fact that the plaintiff's mortgage was not on record afforded some indication that it was in some way satisfied; for men ordinarily cause such instruments to be recorded. These presumptions supplement and strengthen each other, so that, even if we assume that the defendant remembered the plaintiff's mortgage when he took his own, it is an open question whether he could be properly charged with fraud under the circumstances. Is not the presumption that the plaintiff's claim had ceased to exist, nearly or quite as strong as the presumption that the defendant intended a fraud?

Another circumstance we will notice in passing. When the plaintiff purchased his mortgage he did so with full knowledge that two of the defendant's mortgages were first recorded; and it does not appear that he then knew that the defendant wrote that mortgage. So that, for aught that appears, he purchased with full knowledge of the apparent priority of the defendant's equities. What effect that circumstance should have upon the present equities of the parties we will not now undertake to say.

For the reasons above given we think the judgment was erroneous and must be reversed.

In this opinion the other judges concurred.

NORMAN MELONY vs. MICHAEL SOMERS.

A plaintiff who has paid costs on an amendment of his declaration, and who finally recovers judgment, can recover no costs for the period during which he paid costs.

And this rule includes court and clerk fees paid by him as well as other costs.

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ASSUMPSIT; brought to the Superior Court in Windham County. The plaintiff having recovered judgment, the court (*Andrews, J.*) allowed in his favor certain court and clerk fees, as a part of the costs which went into the judgment, for a period during which the plaintiff had paid full costs to the defendant on an amendment of his declaration. The defendant appealed to this court on the ground of the allowance of those items of costs.

J. M. Hall, for the appellant.

E. B. Sumner, for the appellee.

CARPENTER, J. After this case had been pending in the Superior Court for forty-eight terms, the plaintiff amended his declaration upon the payment of full costs. He afterwards recovered judgment, and the court, against the objection of the defendant, taxed the court and clerk fees in his favor from the commencement of the suit. The defendant appealed.

The payment of costs by the plaintiff on the amendment was strictly according to the practice, a rule of court, and the statute. It is a rule which will admit of no exception, that a party shall not receive costs for the time during which he was required to pay costs in the same suit. This subject was considered, and the question now before us virtually settled, in *Richardson v. Hine*, 43 Conn., 203. The question in that case was, whether the plaintiff was entitled to recover costs for the time anterior to the time during which he paid costs. The court held that he could, but in laying down a rule for that case naturally and properly decided the question now before us.

The action of the court below being contrary to this rule was erroneous, and the judgment must be reversed.

In this opinion the other judges concurred.

Hartwell v. Town of New Milford.

HARVEY J. HARTWELL vs. THE TOWN OF NEW MILFORD.

The acts of 1866 and 1868, (Session Laws of 1866, chap. 59, and of 1868, chap. 36,) provide for a state bounty to children of soldiers from this state who lost their lives in the late civil war, such bounty to be paid by the state treasurer to the treasurers of the several towns, and by them distributed. Held, that the town treasurers were made the agents of the state in the matter, and that they personally, and not the towns, were liable to any person for whom money had thus been received and not paid over.

ACTION to recover a state bounty; brought to the Superior Court in Litchfield County, and tried to the court before *Stoddard, J.* Facts found and judgment rendered for the defendant, and appeal by the plaintiff. The case is fully stated in the opinion.

W. Cothren, for the plaintiff.

J. S. Turrell and J. H. McMahon, for the defendant.

LOOMIS, J. From the complaint alone it would be impossible to obtain any idea of the foundation of the plaintiff's claim; and if we examine the bill of particulars we advance but a single step in the way of explanation. We there learn that the comptroller paid money to the treasurer of the defendant town in trust for the plaintiff, but on what account or by what authority or from what the trust arises we know nothing. If we refer to the finding of the court, which it appears was founded in part on the mere statement of the plaintiff's counsel, we learn in addition that the money referred to was *claimed* to have been received by the treasurer of the defendant town under and pursuant to the provisions of chapter 59 of the session laws of 1866, pages 34 and 35, and chapter 36 of the acts of 1868; that the plaintiff became fourteen years of age August 2d, 1869, and that he first learned that the money had been so received, when he was twenty-four years of age.

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If now we examine the statute to see what would constitute a good claim under its provisions, we learn that the law appropriated from the treasury of the state the sum of seventy-five cents per week for the support and education of each child in the state (with certain exceptions) under twelve (afterwards changed to fourteen) years of age, being the child of any person who actually served as a soldier from this state in the army or navy of the United States in the war for the suppression of the rebellion, and died while in or after the termination of such service by reason of wounds received or disease contracted while in such service, or was reported missing in action and had not since been heard from; provided that no payment should be made for the use and benefit of any child who had other adequate means of support or who should be in any poor-house or almshouse.

Then follow sundry provisions to regulate the administration of the state's bounty—making it the duty of the selectmen of the several towns to make quarterly returns under oath to the comptroller of the state of the names and ages of children resident in said towns entitled to the bounty, with a statement of the particular facts showing that they were so entitled; then the act provides for the payment of the money required by the treasurer of the state to the treasurer of the several towns, and makes it the duty of the latter, upon receiving it, immediately to pay over and distribute the same; payment to be made to the guardian of the child, or, if there is no guardian, to the person who has actual custody and control of the child, or under certain circumstances to the person designated by the selectmen; the act providing also certain penalties for malfeasance, to which we will refer in another connection.

Now it seems to us that there are several missing links in the plaintiff's case whereby he fails to connect himself with these provisions.

1. It nowhere appears, either in allegation or proof, that the plaintiff's father, as a soldier from this state, rendered the required service while living, or that he died of wounds

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received or disease contracted in such service, nor that he was reported as missing in action. We are obliged to infer that these facts existed simply because the statute was referred to by the court as the foundation for the plaintiff's claim.

2. It nowhere appears that the plaintiff, while under the age of fourteen years, had no other adequate means of support; nor does it appear by way of substitute for this omission that the selectmen ever certified that the plaintiff was entitled to the bounty.

3. It is not found, except by way of stating the claim of the plaintiff, that the money sought to be recovered was received by the town or its treasurer.

4. There is neither allegation nor finding that the money was not paid to the guardian or custodian of the plaintiff while he was under the age of fourteen. If so paid it was all the law required. It is found that the plaintiff knew nothing about it till he was twenty-four years of age, but it was not essential that he should. The town treasurer was not required to deal with him and had no right to pay the money into his hands.

In view of all these omissions a judgment in favor of the plaintiff would have been manifestly erroneous.

The discussion might properly end here, but as the finding indicates that the court below may have decided the case upon the assumption that if all that the plaintiff's counsel had orally stated was true he could not recover, and therefore the details were not gone into, and as it may save the parties further expense, we will briefly indicate our opinion upon the assumption that the omitted facts were supplied in the record.

We waive any discussion of the question whether the plaintiff at the age of twenty-seven, when this suit was brought, could claim the benefit of a provision intended specially for his education and support while of the tender age mentioned in the statute, and conclude that his remedy, if any he has, is against the treasurer as such, rather than the town.

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The theory of the statute is, that the charity provided wholly by the state is to be disbursed through certain machinery provided by the statute; the agents selected are its own, though as matter of convenience certain officers of the town are named for the purpose, and their duties particularly defined. The money handed to the town treasurer by the state is the money of the state rather than of the town, but it is the duty of the town treasurer immediately to pay it over to the beneficiaries of the state.

If this duty should be neglected a mandamus would undoubtedly lie to compel its performance, but it is quite significant that the only private remedy specially provided is a suit in favor of the party aggrieved against the officer who should appropriate or unnecessarily detain the money, to recover treble damages. It is manifest that the suit thus provided is one against the defaulting officer as such, and that the damages recovered are to be paid by him in his personal capacity.

Again, it is provided that if the selectmen wilfully neglect or refuse to comply with the act, each selectman so neglecting shall forfeit and pay the sum of two hundred dollars, to be recovered by any proper action in the name of the state. The act therefore seems to be directed to these officials not as agents of the town transacting its business, but as agents of the state or of the law; and the remedies specially provided are so efficient that it could not have been anticipated that any other remedies would be needed.

There was no error in the judgment complained of.

In this opinion the other judges concurred.

Smith v. Yale.

JAMES D. SMITH, TREASURER OF THE STATE, vs. JOHN D. YALE AND OTHERS.

Where an officer, receiving for service an execution in a foreign attachment suit, neglects to make personal demand on the garnishee within sixty days after the rendition of the judgment, the cause of action against him for the default accrues at the expiration of the sixty days, and not upon the rendering of judgment against the plaintiff in a *scire facias* afterwards brought against the garnishee.

ACTION on a sheriff's bond; brought to the Superior Court in Litchfield County, and tried to the court before *Sanford, J.* Facts found and judgment rendered for the defendants. Appeal by plaintiff. The case is fully stated in the opinion.

G. H. Welch, for the plaintiff.

A. H. Fenn, for the defendants.

CARPENTER, J. This is an action on the official bond of the sheriff for the default of one of his deputies. The alleged default consisted in an omission to make personal demand of the garnishee in serving an execution issued on a judgment in a suit of foreign attachment. The officer made demand at the usual place of abode of the garnishee, and returned the execution unsatisfied on the 25th day of October, 1878. The execution creditor brought a *scire facias* against the garnishee, which was tried and determined against the plaintiff, on the ground that no personal demand was made of the garnishee at the December, 1880, term of the Superior Court for Litchfield County. This suit was brought May 31st, 1881. One defence on the trial was the statute of limitations—that the suit was not commenced within two years from the time when the cause of action accrued. This defence was sustained by the court below, and the plaintiff appealed. The case must turn upon the answer to the question—when did the right of action accrue?

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The plaintiff contends that it did not accrue until the *scire facias* was decided, in December, 1880. The defendant contends that it accrued when the deputy made default, or more accurately, perhaps, when sixty days had expired after the judgment was rendered; which was in October, 1878, or soon after; the precise time does not appear.

In the case of *Bank of Hartford County v. Waterman*, 26 Conn., 324, it was determined by this court that the right of action for a default in serving mesne process, (a failure to attach property, and making a false return,) accrued upon the failure to collect the debt on the execution, and, consequently, that the statute did not begin to run until that time. The time of the failure is not definitely stated, but the implication is that it was when the execution was returned unsatisfied; and that is the time stated by SEYMOUR, J., in *Welles v. Russell*, 38 Conn., 193.

The plaintiff contends that the same principle applies to this case, for the reason that an execution issued on a judgment in foreign attachment is not a final process necessarily, but may be, and often is, an intermediate step in the proceedings, which are still *in fieri*. Conceding the premises the conclusion does not follow; there is still a material distinction between the services of such an execution and an ordinary writ of attachment. The latter originates a lien on the property attached as security for the debt. In case of a failure to attach the debt may be paid, or the execution may be collected by a levy on other property. If so, the failure to attach does not harm the creditor. Now it cannot be known with certainty that such will not be the result until the execution is returned unsatisfied. Hence it is not certain until then that the creditor was injured by the default, therefore no right of action accrues until then. The former is a step in appropriating property previously attached to the payment of the debt. By the service of the original writ the creditor acquires a right under certain circumstances to collect his debt of the garnishee, or to have the debtor's property in his hands appropriated for that purpose. When demand is made of the garnishees, if he

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pays the debt, or delivers to the officer the property of the debtor in his hands, he has done all that can be required of him, and the execution is in fact as well as in name a final process. If he refuses to pay, or deliver up property, then also that process has performed its functions, and is final process like any other execution returned unsatisfied. The creditor then has a right to proceed against the garnishee; but that is done, not by means of the execution against the debtor, but by a new process supplementary in its character against the garnishee. When the officer omitted to make demand of the garnishee within sixty days after judgment rendered, the consequence was not merely that the creditor failed to secure his debt, with a chance of its being paid or collected from other property, but he lost a security previously acquired; and that fact, in connection with the further fact which appears in this case as existing at that time, that the debtor was insolvent and unable to pay the demand, renders it certain that the creditor has lost his debt. Two things are now certain which are uncertain in the case of mesne process—his debt is conclusively established, and it is reasonably certain that it will not be paid. The instant he lost his lien on the property in the hands of the garnishee, the debtor then being destitute of attachable property, he suffered an injury, and the cause of action was complete. It was unnecessary to bring an action against the garnishee in order to establish or prove the injury. The injury already existed and was sufficiently shown when the omission and inability of the debtors to respond was proved. These two circumstances concurring, the legal injury was complete, and further developments were not important.

Again, there is a close analogy between the failure in this case and the failure to comply with some statutory requirement in the levy of an execution on real estate or a sale thereon of personal property. In such a case the law presumes some damage. *Bank of Hartford County v. Waterman, supra.* The extent of the damage may depend upon circumstances. It may be the loss of the whole debt, or it may be only of the expense of that proceeding. In this

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case the creditor incurred the expense, with no beneficial result, of prosecuting the foreign attachment. It would seem that that of itself would be sufficient to sustain the action, independently of the question whether the debt may or may not be ultimately paid.

The plaintiff's counsel suggest that, as in the case of a failure to serve mesne process it is necessary to wait and see if the debt will be paid, or if it can be collected on an execution, so in this case it is necessary to see if the debt can be collected on the *scire facias*. Perhaps the default will not be noticed, or the garnishee may possibly waive it, or in some way fail to take advantage of it. The suggestion contemplates the possibility of collecting the debt from one who is under no legal obligation to pay it, and who, if he does pay it, may have no claim on the debtor for indemnity. The proceeding against the garnishee was at best an experiment, which, if it had been successful by reason of any of the matters suggested, would most likely have resulted in injustice. It is unnecessary to say that the law requires no such experiment.

The law will tolerate, and in some instances require, an effort to collect a debt of the debtor; but it will not tolerate, much less will it require, a creditor to attempt to collect his debt of another who is under no legal or moral obligation to pay it.

Our conclusion is that the cause of action accrued more than two years before the commencement of this suit, and that the Superior Court rightly held that the statute of limitations applied to it.

In this opinion the other judges concurred.

ELLA E. BEARDSLEY *vs.* THE CITY OF HARTFORD.

A city is not bound to maintain a railing in front of the numerous basement offices and shops that line its business streets.

As cities are, by reason of special advantages, burdened with special duties

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as to highways from which country towns are exempt, they should have the benefit of exemptions from liability arising out of the necessities of their business.

Open basement descents being necessary to the business of a city, the failure of the city to erect a barrier in front of them is not of itself negligence, and the city is not liable to a passer-by who, without negligence on his part, falls down such descents.

There is no negligence on the part of a city, in the omission to do that which it either has no right to do, or which it would be unreasonable for it to do.

The negligence of a town or city, to make it liable for an injury from a dangerous condition of a highway, must be such as would have made it liable to an indictment.

In some of the states a distinction is made as to the rule of liability, between municipal corporations, or corporations proper, and quasi corporations, such as towns or counties, imposing a greater liability on the former. But this distinction is not made by the courts of the New England states, and it is helden by them that a municipal corporation is liable only by force of the statute.

The absence of a railing, where the public travel is endangered by the want of it, constitutes a defect in the highway, as rendering it unsafe for public travel, independently of any statutory provision as to a railing.

- ACTION ON THE CASE for an injury sustained by the plaintiff through the defective condition of a sidewalk of the defendant city; brought to the Superior Court in Hartford County. The following facts were found by the court:

On February 12th, 1877, and for a long time prior thereto, Farmington Avenue was and had been a highway, within the limits of the city of Hartford, which the city was legally bound to keep in repair.

On the south side of the avenue, at the corner of Flower street, stood a building known as the Union Hall Hotel, belonging to private parties. The upper part of it was used as a hotel and the lower story was occupied by stores. The entrance to the hotel and stores was on the Farmington Avenue front, and this front was seventy-five feet long. The distance from this hotel building to the curbstone or gutter on the south side of Farmington Avenue, was about seventeen feet and six inches. The street line as laid out, as appeared from the city surveys, ran in a line parallel with the hotel, about eleven feet south of the curbstone, and about six and one half feet from the front of the build-

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ing. But the whole distance from the curbstone in front to the building was covered with flagging stones, and there was no visible mark to indicate where the street line was, unless it was that east of the hotel there was a fence between the street and the adjoining proprietors which was placed on or near the street line as laid out, but did not extend west beyond the east end of the hotel building. One of the stores in the lower story was occupied by one Habenstein as a bakery, being the second store west of the east end of the building, underneath which was a basement with a flight of stone steps leading down to the basement from the flagging in front of said building. This stairway was five feet six inches wide, and the opening extended out from the front of the building four feet and seven inches, and the stairway was about ten feet deep and very steep, the first step being about twenty inches south of the south line of the street as laid out.

On the west side of the stairway was an iron railing or guard, attached to the building and extending out nearly as far as the opening and partially guarding it, but the east side and front were wholly unguarded, and the opening or stairway was dangerous for persons passing along the sidewalk on the south side of Farmington Avenue in the night season, by reason of the liability to overstep the line of the street as laid out and fall into it.

On the evening of February 12th, 1877, about half-past nine o'clock, it being very dark and the wind blowing with great force, the plaintiff, who taught in a night school, had occasion to pass along the avenue from the east on her way home from school, in company with two other lady teachers in the night school. The store east of that occupied by Habenstein was a drug store with lights in the windows, but which did not cast any light upon the opening in question. Nor were there any street lights near enough to send any light on the opening. As these three ladies came along from the east, they drew in towards the wall of the hotel to avoid somewhat the violence of the wind.

The plaintiff passed along until she arrived near the

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edge of the stairway, of the existence of which she was ignorant. She then turned to speak to the lady behind her, and stepping backward fell into the opening and down the steps, receiving very serious and painful bodily injuries from which she is still suffering.

The accident and the injuries resulting were in no way occasioned by the negligence or want of care of the plaintiff.

The plaintiff gave notice to the defendant city of the injury as required by law.

Upon the foregoing facts the defendant claimed that it was not liable for the injuries sustained by the plaintiff, and that judgment should be rendered for nominal damages only; for the reasons—

1. That the stairway in question was not a defect in the highway, for which the defendant city was responsible.

2. That the injuries were wholly caused by a dangerous opening located upon private property, for which the owner thereof was alone responsible.

3. That the injuries were received wholly outside of the highway and were occasioned by causes existing wholly without it, and which operated upon the plaintiff only when outside the limits of the highway and upon private property, the accident being from its inception to its end wholly without the highway.

4. That the nature of the defect and the circumstances of the injury were not such as to render the defendant responsible therefor.

The court (*Beardsley, J.*) overruled these claims and gave judgment for the plaintiff, for \$800 damages.

The defendant appealed to this court.

S. O. Prentice, for the appellant, cited 2 *Dillon Municip. Corp.*, § 1000; *Wood on Nuisances*, §§ 317, 324; *Dimock v. Town of Suffield*, 30 Conn., 129; *Stonington v. States*, 31 id., 213; *Hewison v. City of New Haven*, 84 id., 136; *Ayer v. City of Norwich*, 39 id., 376; *Snow v. Inhab. of Adams*, 1 *Cush.*, 447; *Smith v. Inhab. of Wendell*, 7 id., 498; *Kel-*

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logg v. Inhab. of Northampton, 4 Gray, 65; *Hixon v. City of Lowell*, 13 id., 59; *Richards v. Inhab. of Enfield*, id., 346; *Hawkes v. Inhab. of Hawley*, 128 Mass., 210; *Davis v. City of Bangor*, 42 Maine, 522; *Dickey v. Maine Telegraph Co.*, 46 id., 483; *Taylor v. Peckham*, 8 R. Isl., 349; *Sykes v. Town of Pawlet*, 43 Verm., 449.

A. P. Hyde and *F. E. Hyde*, for the appellee.

1. The basement descent was within the limits of the highway as actually used by the public, and therefore the city is liable, although it was a little outside the street line as laid out on the survey of the street. The court found that there was flagging extending from the curbstone clear up to the front of the building. There was no mark to fix the line of the street as laid out. The unbroken line of sidewalk was an invitation to the public to pass as well on the one side of the invisible street line as upon the other. Thereby the sidewalk on the outside of the street line became as much a part of the actual highway as that on the inside. In *Ely v. Parsons*, 2 Conn., 382, it was held that where an order of the County Court fixing the limits of the prison made the line of a street one of the boundaries, it must be construed to mean the practical line, as it was used and traveled at the time of making the order, and not the air line specified in the laying out of the street. In *Manchester v. City of Hartford*, 30 Conn., 118, it is held that a sidewalk along a public street in a city, having been constructed and thrown open for public use, and used in connection with the rest of the street, must, *as a part of the street*, be so maintained and repaired as to be reasonably safe and convenient for the passage of travelers exercising ordinary care. We think it is clear under these decisions, and the finding of the court, that the place where this accident occurred was within the limits of the highway in the sense in which the statute uses that word. It was an open stretch of walk, whereon the public were invited to walk day and night. Nothing could indicate to them that they were outside the street line. It is clear that the statute

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cannot mean by the word "highway" an undefined, unknown thing, which exists only on paper, and which it requires a surveyor with a compass and chain to locate. On the contrary, on principles of common sense, and in accordance with previous decisions of this court, it means the actual highway as people know it, and as they are using and have been accustomed to use it.

2. If the court shall hold that the word "highway," as used in the statute, refers only to that portion of the street included between the invisible lines of the survey, the defendant is still liable. In the case of *Munson v. Town of Derby*, 37 Conn., 298, the place where the accident occurred was a long distance from the line of the highway approved and accepted by the selectmen. A ditch had been opened across the abandoned highway and the plaintiff, mistaking the old for the new highway, was precipitated into the ditch and injured. In this case also the defendants claimed (p. 308) that the "plaintiff must prove to the satisfaction of the jury that the precise place where the injury was received was a public highway in the town of Derby;" but the court says (p. 311): "The fact upon which the defendants so much rely, that the place where the accident happened was from twenty to forty rods from the point of divergence of the two roads, and from two to five rods distant from the nearest point in the new highway, seems to us to be entitled to little or no weight. The danger did not materially depend upon the proximity of the ditch to the new highway, nor was it to any appreciable extent diminished by its distance from it." And on pages 313-314: "The case of *Davis v. Hill*, 41 N. Hamp., 329, is an authority directly establishing the proposition that 'the want of a sufficient railing, barrier, or protection to prevent travelers passing upon a highway from running into some dangerous excavation or pond, or against a wall, stone, or other dangerous obstruction, without its limits, but in the general direction of the travel thereon, may properly be alleged a defect in the highway itself.' The same doctrine is supported by *Willey v. City of Portsmouth*, 35 N. Hamp., 303." Though the facts in the

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case now before the court are not precisely the same as above, the difference is only in the fact that in that case the accident happened several rods from the line of the highway. In the present case the distance was only twenty inches, and *in the general direction of the travel* on the highway. In *Littlefield v. City of Norwich*, 40 Conn., 406, there was an accident which happened by the plaintiff falling into an opening left by removing a grating, and in consideration of the facts in the case the court held the city not liable, but it also held that "if the construction of the grating had been such as to make it constantly dangerous to public travel upon the walk, by its liability to be left out of place, and a proper supervision and care on the part of the city authorities would have discovered the danger and guarded against it, the city would have been liable. It is the duty of the city authorities to be vigilant to guard against such accidents." In *Hevison v. City of New Haven*, 34 Conn., 136, our court held that "any object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which from its nature and position would be likely to produce that result, will as a general rule constitute a defect in a highway." In the case of *Hayden v. Inhabitants of Attleborough*, 7 Gray, 342, the lower court instructed the jury as follows: "That if the line of the highway was not indicated by any visible objects, such as fences, banks of earth, or other objects, and if there was nothing to show the plaintiff in the evening that the route she was pursuing was not within the way intended for public travel, and if, within the general course and direction of the travel, where travelers were accustomed to pass along the said highway, the cellar was so situated within the limits of the highway as to render the traveling there dangerous, or without the limits of the located way but so near as to render the traveling there dangerous, in the condition in which it was at the time of the accident, and the cellar was suffered to remain beyond a reasonable length of time within which to put the same in

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a safe condition, or more than twenty-four hours, and the defendants had reasonable notice of the course of the travel, and of the dangerous condition of such cellar, and there was nothing reasonably to indicate or give notice to travelers of their approach to the cellar, until too late to avoid the same, the town would thereby become liable." The higher court sustained this charge. See also *City of Norwich v. Breed*, 80 Conn., 535; *Boucher v. City of New Haven*, 40 id., 456. We claim, therefore, that under the decisions of this court, and the general tenor of the law in such cases, and according to justice and good sense, the plaintiff is entitled to the damages awarded by the lower court, whether the unguarded opening, which caused the injury to the plaintiff, was within the limits of the highway, or twenty inches without the surveyed street line. It was in the highway as used by the public, was dangerous to all night travelers, and the city was negligent of its duties in not causing the same to be properly guarded or closed.

LOOMIS, J. This is an action on the statute with regard to highways to recover damages from the defendant city for an injury sustained by the plaintiff through, as it is claimed, the defective condition of a sidewalk of the city. The case was defaulted in the Superior Court and heard in damages. The court awarded full damages, and the case is brought before us by a motion in error, the defendant claiming that the court erred in awarding more than nominal damages.

The facts as presented by the record are briefly as follows:—The place where the injury was received is a long established street of the city known as Farmington Avenue, at a point where a hotel fronts upon the street, with the space between it and the street line open and flagged like the sidewalk, with nothing to indicate the line between the street proper and the open space in front of the hotel. The front of the building is found to be seventeen and a half feet south from the curbstone of the sidewalk. The line of the street is eleven feet south of the curbstone, leaving six and a half feet of space, which was private property, be-

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tween the street line and the front of the building. The hotel is kept in the second and higher stories of the building, with an entrance in front, and all the lower story is occupied by stores fronting on the street, the whole frontage of the building being seventy-five feet. One of these stores, with a basement, and a stairway in front leading to the basement, was occupied by one Habenstein as a bakery. The basement stairway extended four feet and seven inches from the front of the building, and had no protection except an iron railing on the west side of it. The plaintiff, on the 12th of February, 1877, had occasion to pass along the sidewalk from the east about half past nine in the evening, with two other ladies, and fell into this basement entry-way and was seriously hurt. It is found that the night was very dark and the wind blowing with great force, and that the three ladies went in close to the building to protect themselves somewhat from the violence of the wind, and that the plaintiff, when near the basement entrance, without being aware of its vicinity or existence, turned to speak to one of the ladies behind her and stepping backward fell into the opening. It is also found that the accident happened without negligence or want of care on her part.

It is well settled that a town or city is not liable for injuries from a defect in the highway except as made so by statute. In some of the states a distinction is made, as to the rule of liability, between municipal corporations, or corporations proper, and quasi corporations, such as towns or counties, imposing a greater liability on the former. But this distinction is not made by the courts of the New England states, and it is holden by them that a municipal corporation is liable only by force of the statute. That is clearly the law of this state.

Our statute provides that "towns shall, within their respective limits, build and repair all necessary highways and bridges, except where such duty belongs to some particular person." Gen. Statutes, p. 281, sec. 1. Cities by their charters are charged with the same duty with regard to the highways and bridges within their limits. And the

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10th section of the statute provides that "any person, injured in person or property by means of a defective road or bridge, may recover damages from the party bound to keep it in repair." Another section of the statute provides that there shall be "a sufficient railing or fence on the side of such bridge, and of such parts of such road as are so made or raised above the adjoining ground as to be unsafe for travel." We think however that this provision does not apply to a case like this.

It has been repeatedly held in this and other states that the absence of a railing, where the public travel is endangered by the want of it, constitutes a defect in the highway; making the town or city liable, not by force of any statute specifically requiring a railing, but under the general provision that the highways shall be kept in repair; that term being held to mean that they shall be kept in such condition as to be *safe for public travel*.

A sidewalk is of course a part of a street, and entitled to the same protection as the rest.

The counsel for the defendant city has argued the case as if the mere fact that the place where the injury occurred was outside of the limits of the highway, is sufficient to save the city from all liability, even though the opening made travel unsafe. This proposition can not be sustained. An object or a state of things outside of the line of the street may render travel unsafe, and make a town or city liable for an injury occasioned by it. Of course nearness to or remoteness from the line of the street is a very important and generally decisive consideration in determining whether the travel is rendered unsafe by it, but where it is so near as clearly to endanger public travel the fact that it is outside of the line of the street has no other effect than this; if within the line of the street the authorities of the town or city have entire control over it, and can remove it if it be an obstruction, or fill up the cavity, if the defect be of that character, while they have no power to go upon private property for the purpose of doing it. The whole power, and so the whole duty, of the corporation is to protect the

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public against it by a railing. This they have power to place, not on the property of the adjoining owner, but only on or within the line of the street. If the adjoining owner has dug a deep hole near the street line he is personally liable for any injury that a passenger upon the sidewalk, who uses ordinary care, may sustain by falling into it. But the city will also be liable, not for the digging of the hole, nor for leaving it unfilled, but for not doing what it had perfect power to do, erecting a barricade of some sort to prevent passengers from getting into it.

About this general principle there can be no serious question. It is well stated by HOAR, J., in *Alger v. City of Lowell*, 3 Allen, 405. "The place where the plaintiff fell was indeed outside of the line of the street; but the defect in the street which occasioned the injury was the want of a railing, if one was necessary at that place to make the street safe and convenient for travelers in the use of ordinary care. * * * The true test is not whether the dangerous place is outside of the way, or whether some small strip of ground not included in the way must be traversed in reaching the danger; but whether there is such a risk of a traveler, using ordinary care in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient." Numerous authorities might be cited to the same effect.

The whole question in the present case is therefore, whether it was the duty of the city to have placed a railing or barrier of some kind against these basement steps, so as to make sure that no passenger on the sidewalk could stray from the public way and fall down them.

And here it is to be observed that the city had no power to erect a railing that should simply fence in, in front and on the sides, this basement stairway. It would have had to go upon private ground to do this, and that it had no right to do. It could only erect a railing along the outer line of the sidewalk in front of the stairway. But such a railing would not have protected passengers from getting behind it unless it was carried along the whole front. It is found

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that a fence ran along the street line from the east, but only as far as the east corner of the hotel. As the plaintiff came along the walk from the east she must have been within the street line until she reached the corner of the building. Habenstein's store was the second from the east corner, and the basement steps were immediately east of the door of his store. The plaintiff must have made therefore a very sudden deflection from the line of the sidewalk to bring herself in that short space, probably not over twenty or at most twenty-five feet, in close proximity to the building. It is found that the drug store at the east corner of the building had lights in the windows, so that she must have been aware of the deflection of her course. And her conduct in the matter is explained by the finding that she turned in towards the building "to avoid somewhat the violence of the wind." It is plain that, turning in at such an angle, as she left the part of the sidewalk that was fenced, would have brought her inside of any mere front railing that the city could have erected along the line of the walk on its own ground. A passenger thus turning in could be protected from falling into the basement gangway only by side railings, which the city had no right to place there, or by a continuous front railing that would have cut off all access to the hotel door and the doors of the stores, except through gates to be opened and shut as people passed in and out. Such an embarrassment as this to free ingress and egress would not be tolerated in a city, in front of a hotel and stores.

And this brings us to what we think is the real question in the case. Is a city bound to maintain a railing in front of the numerous basements and basement steps that line its business streets? Such basements are used in every populous city for business purposes of almost every kind. In a large city like New York the first story of almost every business block is reached by steps, that extend to the line of the street, while on each side of them are steps leading down to offices in the basement. These offices are of great value and rent for large sums, and it is essential to their

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convenient and profitable use that they be as open as possible to the entry of the public. Indeed a railing in front of them, with the necessity of opening and shutting a gate as people passed in and out, would greatly impair their value for all the purposes that give them value. The same state of things exists, though in less degree, in a smaller city like Hartford. Along its principal streets such basement shops may be counted by scores. In many of them there is not merely the necessary depression for steps, but the excavation extends along the whole front, giving room for larger windows, and wider entrance. Every such depression by the side of the walk, though outside of the limits of the street, renders travel along the sidewalk dangerous; for even if the descent be one of but two or three steps, it would be enough to cause a dangerous fall to one who should inadvertently step off. Indeed, as a person by such a fall would be thrown against the brick or granite sides of the building, such a place would be much more dangerous than a pit-fall as deep in a place in the country, where one would fall only upon the soil. It is true that the more populous the city, and hence the more thronged the street, the greater is the number of persons exposed to the danger; but as the city becomes more populous and the streets more thronged, the higher become rents, and the greater necessity for and value of such basement offices and places of business. It may indeed be set down as one of the necessities of city life, that basements along its business, and therefore its most thronged streets, should be thus used, and that they should be not only open but inviting to the public. Now what is the duty of the city with regard to them? There is no practicable way of perfectly protecting the public but by a railing in front of them. Can it be regarded as the duty of a city to maintain such a railing? Are we to apply to the case without qualification the same rule that would be applied to a pit hole, like the cellar of a burned building, adjoining a sidewalk, where a railing would cause no inconvenience to the owner of the property?

It is a well settled rule that the law varies with the vary-

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ing reasons on which it is founded. This is expressed by the maxim, "*cessante ratione, cesset ipsa lex.*" This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances.

There are certain special duties with regard to highways resting on cities by reason of their character as such. One is that of having a more perfect road bed for the greater amount of travel. Another that of making sidewalks of ample width and generally flagged. Still another that of removing snow and ice from the streets and walks. Thus, in *Landoft v. City of Norwich*, 87 Conn., 618, SEYMOUR, J., says. "The peril [from snow and ice] is not such as to warrant the great expense, in a sparsely inhabited village, of attempting a preventive or remedy; but in cities the aggregate of peril by reason of the number exposed to it becomes considerable, and the means of meeting the needful expense are ample; and hence in cities the public as such properly undertake the duty of doing the best they can to provide against the dangers to travel which winter in this climate necessarily brings with it." Now if, by reason of the special advantages and special necessities of cities they are by law burdened with special duties of this sort, from which country towns and villages, by reason solely of their character as such, are exempt, surely the rule should work favorably for cities in those particulars in which the necessities of business impose upon them limitations which do not exist in country towns. People collect in cities in large part for purposes of traffic, and to these purposes the central and most crowded streets of a city are almost wholly devoted. Must not the necessities of this business furnish the law that shall determine the action of the city in the matter of barring out the public, for the sake

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of the safety of travelers, from those places below the level of the sidewalk that the business of the city absolutely requires should be kept easily accessible? There are special dangers all along a city street, for an unwary foot passenger, that do not exist in country towns. The projecting steps against which a pedestrian can so easily stumble in the night and be hurt, the hitching posts, posts for awnings, the very curb stone over which he could so easily trip, with the lower level of the gutter into which he could so easily be carried by a misstep, the occasional necessary descent of a steep place by steps, the projecting buttresses of buildings against which he might run—all needing but a slight deflection from the central part of the walk, which one would be very likely to make in a dark and stormy night—all these things, presenting dangers rarely found in a country village, and dangers to which the larger population makes the aggregate of exposure much greater, a city does not attempt, and is not expected, to provide against. They are necessary features of a city, and the peril a necessary incident of city life. The open basement descents are as necessary to the business of the city as the open and unprotected wharves of a seaport are to its commerce. Some streets in the city of New York lie close along the water, the wharves opening from them, and necessarily kept open for the passage of drays, while their outer edge is protected only by a low string piece, which while sufficient to prevent drays from backing into the water, would be no protection to a foot passenger, but would be likely to cause him to stumble and fall into the water. These unprotected wharves are often but a few feet from the line of the street, and the passenger could easily stray upon them in a dark night.

The principle we are laying down is only the old established one, that the city must have been guilty of negligence in leaving a basement entrance unprotected, before it can be liable for an injury happening by reason of it. If the erection of a barrier in front of such an entrance is what the city has no right to do, or if, having the right, it is what it cannot reasonably be expected to do, then there

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is no negligence in the omission to do it. This principle is abundantly sustained by the authorities. In *Taylor v. Peckham*, 8 R. Isl., 349, the court held that a town was not liable for an injury from the fall of a sign which had not been securely fastened in its place upon a building outside of the limit of the highway. BRADLEY, C. J., in giving the opinion of the court says (p. 352:) "The liability for such accidents would carry with it an equally extensive authority. The towns must necessarily have a corresponding right to control the uses of property adjoining the highway, so as to protect themselves from the liabilities for such use." In *Hubbard v. City of Concord*, 35 N. Hamp., 52, SAWYER, J., giving the opinion of the court says (p. 68:) "We think it must be held to be the meaning of the enactment which subjects towns to liability for injuries resulting from obstructions, insufficiencies or want of repairs in their highways, that nothing is an obstruction which the town was not bound to have removed at the time of the injury under the circumstances of that particular case; nothing an insufficiency which it was not reasonably bound then to have improved; nothing a want of repairs which, in the same view it was not bound to have amended. * * If there was no duty there was no negligence. In the very idea of negligence is embraced a duty which the party ought to have performed. If the town, under all the circumstances, was not bound to remedy the defect or remove the obstruction, it is chargeable with no negligence or failure of duty." In *Jones v. Inhabitants of Waltham*, 4 Cush., 299, the defendant town was sued for an injury by falling into a cattle guard at a place where a railroad crossed the highway. The town had placed a railing before it as far as it was able to do without interfering with the passage of the cars. METCALF, J., giving the opinion of the court, says (p. 301):— "The only ground upon which the town can be held liable to this action is, that there was a dangerous place on the road side which required a fence or barrier to make the road safe for travelers. But when a town has no power to erect such fence or barrier, it is not answerable for the con-

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sequences which follow from the want of it." Clearly there can be no difference in law between the case where a city has no power to place a barrier, and the case where it would, in view of all the circumstances, be unreasonable and improper for it to place one.

That the negligence of the town must be actual and not merely constructive, follows from the rule, which is well settled, that the neglect to repair or render safe a highway must be such as would have made the town liable to an indictment. Thus, it is said in *Davis v. City of Bangor*, 42 Maine, 522, that "the liability of a town for damages arising from a defective highway depends upon proof of the same facts that would render it liable to indictment, and in all cases where it may be held for damages it may be indicted." In *Wood on Nuisances*, sec. 324, it is said that "as a rule, those defects only are actionable which are indictable at common law as nuisances"; and further on in the same section the law on the subject of exposures to injury from objects outside of the line of the highway is thus laid down—(more strongly we think than the authorities will warrant:) "For injuries resulting from any obstruction in the highway itself, and over which the proper authorities have lawful control, and which they can lawfully remove, the town or city is liable. But where the injury results from something outside the limits of the highway, upon land which they have no authority to enter upon, the individual making or continuing the erection or obstruction alone is liable. It would be highly inequitable to hold the town liable for injuries resulting from something over which they have no control and which they cannot remove, any more than any other citizen."

Now in the court below, the judge, before whom the case was tried upon a hearing in damages, found the fact that travel along the sidewalk in question was endangered by the basement opening in question, and that the plaintiff sustained the injury while in the use of ordinary care, and upon these facts alone held the city liable to pay full damages. We think the court was in error in this, and that a further

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fact was necessary to the liability of the defendants, namely, that the basement opening was one which the city was bound to have protected the public against by a railing. The law will not infer the liability from the mere fact of the danger. The law will not hold the city to the duty of erecting a barrier before such a place unless in all the circumstances it was reasonable and proper to erect one. **And this fact should appear in the finding.**

There was error in the judgment complained of.

In this opinion the other judges concurred: except PARDEE, J., who dissented.

DUDLEY WRIGHT vs. THE CITY OF HARTFORD.

The constitution of the state (24th Amendment) provides that "neither the General Assembly nor any county, city, borough, town or school district, shall have power to grant any extra compensation to any public officer, employee, agent or servant, or increase the compensation of any public officer or employee, to take effect during the continuance in office of any person whose salary might be increased thereby." Held that a person employed as tillerman of a ladder carriage in the fire department of a city, at a fixed yearly salary, payable monthly, and who was to hold his place during good behavior, was within the provision, and that his salary could not be increased during his continuance in the employment.

CIVIL ACTION to recover for services as a fireman; brought originally before a justice of the peace, and, by appeal of the defendant, to the Court of Common Pleas of Hartford County. Facts found in that court, and case reserved for advice. The case is fully stated in the opinion.

C. J. Cole, for the plaintiff.

S. O. Prentice, for the defendant.

PARDEE, J. On June 4th, 1878, the plaintiff entered into a contract with the defendant city to serve it in its fire

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department as tillerman of a ladder carriage, to hold his place during good behavior; his compensation to be \$650 per year, payable monthly. This continued service included the month of July, 1882. In March of that year the common council voted that his salary should thereafter be \$750 per year. He was paid for the month of July following at the rate of \$650 only; he claims payment at the rate of \$750, and his suit is for the unpaid balance. The Court of Common Pleas reserves the case for the advice of this court.

The constitution provides that "neither the General Assembly, nor any county, city, borough, town, or school district, shall have power to pay or grant any extra compensation to any public officer, employee, agent or servant, or increase the compensation of any public officer or employee, to take effect during the continuance in office of any person whose salary might be increased thereby, or increase the pay or compensation of any public contractor above the amount specified in the contract."

This is the clear expression of an intent to render impossible any addition to the pay, fixed by statute or contract, of any person serving the state or any municipality. The provision regards an increase during the term of service and a gift at its close as equally destructive of the public good and aims to prevent both; the latter by the first clause, the former by the second. As it regards an increase and a gift with equal abhorrence, so it abhors them equally whether made in behalf of the servant highest in dignity or of the lowest. The first clause from abundant caution and with repetition uses the words "public officer, employee, agent or servant." The second clause uses the words "officer" and "employee." But these two are equally inclusive with the other four; and the manifest intent to include all, and the express mention of "employee," are not to be nullified by the subsequent use of the words "officer" and "salary." The plaintiff is within the prohibition.

The Court of Common Pleas is advised to render judgment for the defendant.

In this opinion the other judges concurred.

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ISAAC MCVANE vs. CHARLES S. WILLIAMS AND ANOTHER.

The Practice Act provides (sec. 1,) that the complaint in a civil action shall contain a statement of the facts constituting the cause of action, and (sec. 33,) that the common counts may be used when appropriate, but that a bill of particulars shall be filed in court by the plaintiff or such further statement as may be necessary to show the cause of action as fully as is required in other cases. Under a complaint containing only the common counts for money lent, paid, and had and received, the plaintiff filed the following bill of particulars:—"1882, Feb. 6. To cash lent and money had and received, \$350." Held that under it the plaintiff could not recover for money paid under duress.

Where a person pays under compulsion just what he ought to have paid voluntarily, he has no standing in justice and equity to recover the money back.

CIVIL ACTION, upon a complaint containing the common counts for money lent, money paid and expended for the defendants, and money had and received by them to the use of the plaintiff; brought to the Court of Common Pleas of Hartford County and tried to the court before *Bennett*, acting judge. Facts found and judgment rendered for the plaintiff. Appeal to this court by the defendants. The case is sufficiently stated in the opinion. The defendants were partners under the firm name of "George W. Williams & Co."

M. R. West, and J. L. Barbour, for the appellants.

G. G. Sill and T. E. Steele, for the appellees.

LOOMIS, J. The complaint in form is for money lent, money paid, and money had and received. The ground of recovery in fact however is simply that the moneys were paid by the plaintiff to the defendants under duress by threats of unlawful imprisonment. The defendants upon the trial objected to any evidence tending to show the duress, for the reason that neither the complaint nor the bill of particulars made any reference to such a fact.

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The Practice Act, p. 1, sec. 1, requires that in all civil actions "the complaint shall contain a statement of the facts constituting the cause of action :" and this expresses the controlling idea which the new mode of pleading seeks to enforce. This requirement is no where qualified in the act referred to, but in the Orders and Rules made by the judges pursuant to the authority given them by the thirty-third section of the act, it is provided that "the common counts may be used for the commencement of an action, where any of these counts is an appropriate general statement of the cause of action ; but the defendant shall not be required to plead, nor shall any default be taken, until the plaintiff has filed a proper bill of particulars, or such further statement by way either of a substituted complaint, or of amendment, as may be necessary to *show his cause of action as fully as is required in other cases.*" Rules, p. 12, sec. 1.

The commencement of the action was in accordance with the rule ; but when the plaintiff proceeded to file his bill of particulars he fell far short of the above requirement, and only repeated the very general language of his original complaint, as follows :—

George W. Williams & Co.,
1882. To Isaac McVane, Dr.
Feb. 6. To cash lent, and money had and received, \$350.
To interest on do.

Under such a complaint and bill of particulars the defendants had a perfect right to assume that the plaintiff's claim was for an ordinary loan or transaction in regard to money which they had received, instead of being founded wholly upon an involuntary payment extorted by their threats under a well grounded fear of unlawful imprisonment.

There are also other provisions contained in the Rules which strengthen our position. Under the head of "General Rules of Pleading," p. 14, section 1, it is provided that "acts and contracts may be stated according to their legal effect, but in so doing the pleading should be such as fairly

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to apprise the adverse party of the state of facts which it is intended to prove." And under the head of "Pleadings subsequent to the Complaint," p. 16, sec. 6, it is provided that "no facts can be proved under either a general or special denial, except such as show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements, but show, notwithstanding, that he has no cause of action, must be specially alleged." Then follows a list or statement of such facts as must be specially pleaded, and among them is *duress*.

We find also that in other states where the code system has been adopted, the facts showing duress must be pleaded. 6 Wait's Actions & Defenses, p. 633. In *Commercial Bank v. City of Rochester*, 41 Barb., 341, in an action to recover back money paid on compulsion or by duress of goods, it was held that the complaint must state the facts, so that the court may see that the payment was in fact compulsory, and this decision was subsequently affirmed by the Court of Appeals in 41 N. York, 619. See also *Town of Brazil v. Kress*, 55 Ind., 14, and cases there cited.

For these reasons we conclude that there was error in the ruling referred to. As this results in another trial it is not necessary to pass upon the other reasons for appeal unless for the purpose of settling questions in regard to which the court below might remain in doubt. The principles of law however which control those questions are so well settled that there is little room for controversy. Whatever doubts exist in the present case arise we think principally from certain omissions in the finding, which leave the ultimate facts to be determined by mere evidential facts and by a construction of the finding.

It seems to us there ought to have been some distinct finding as to the justice of the claim made by the defendants, for, if the plaintiff paid, though unwillingly, just what he ought to have done voluntarily, he has no standing in justice and equity to recover the money back; and the finding "that the defendants did not offer any evidence to prove that McVane had defrauded them of any oil, or was

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indebted to them in a larger sum than \$44.95, will not suffice to cure the omission, for the reason that upon this issue in this form of action the burden of proof was upon the plaintiff.

Again, it does not distinctly appear whether the threat of arrest made by the defendants referred to criminal or to civil proceedings, although there are evidential facts found which might justify an inference that the former was referred to. It was however within the exclusive province of the court below to determine this fact, whether by inference or upon direct evidence.

In this state of the record we deem it best to avoid any decision upon the merits of the case.

There was error in the judgment complained of.

In this opinion the other judges concurred.

CHARLES S. DANIELS vs. THE EQUITABLE FIRE INSURANCE COMPANY.

A policy of fire insurance provided that in case of loss the insured should produce a certificate under the hand and seal of a magistrate, stating that he knew the character and circumstances of the assured, had inquired into the facts, and believed that the assured had, without fraud, sustained loss on the property insured, to the amount stated in the certificate. Held that the furnishing of such a certificate was not waived by the insurance company by its agent having received the proofs of the loss and having made no objection to them on the ground of the omission of the certificate; it not appearing that the agent was such for any such purpose, nor that he did more than transmit the proofs to the company.

Nor by the fact that the company objected to payment for the loss on other grounds.

Nor by the fact that the proofs had been in the hands of the company for two years, and that they had not called the attention of the assured to the want of the certificate.

The policy provided that if the insured premises should be so occupied or used as to increase the risk without the assent of the company, the policy should become void. The policy allowed the insured to use naphtha in his

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J. business, but with no fire or lights in the building except a small stove in the office. The assured, without the consent of the company, placed a stove in a room called the finishing room, in which there was frequently a large quantity of inflammable naphtha gas. Held that this was an increase of the risk which avoided the policy.

ASSUMPSIT on a policy of fire insurance ; brought to the City Court of the city of Hartford, and, by appeal of the defendants, to the Superior Court for Hartford County, and in that court tried to the jury before *Beardsley, J.* The plaintiff's evidence being in, the defendants moved for a nonsuit, which the court granted. The plaintiff moved to set the nonsuit aside, which motion the court denied, and the plaintiff brought the record before this court by a motion in error. The case is sufficiently stated in the opinion.

G. G. Sill, with whom was *G. Case*, for the plaintiff.

C. E. Perkins, for the defendants.

CARPENTER, J. The policy provides that in case of loss the insured "shall produce a certificate under the hand and seal of a magistrate or notary public, (nearest to the place of the fire and not concerned in the loss as a creditor or otherwise, nor related to the assured,) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or notary public shall certify."

The proofs of loss contain no such certificate, and no such certificate was ever in fact procured and furnished to the defendant. That omission of itself justifies the nonsuit unless the plaintiff is right in his claim that there was a waiver. In support of that claim the plaintiff calls attention to these circumstances : 1st, that proofs were made out and given to Chapman, the agent of the company, and that no objection was made on account of the omission ; 2d, that the defendant refused to pay on other grounds ;

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and 3d, that the defendant had the proofs in its possession for nearly two years and carefully concealed from Bray, the insured, the absence of such a certificate.

In regard to these:—*First.* There is no evidence that Chapman knew of the omission; it does not appear that he did anything more than to transmit the proofs to the company; and if he did know, there was no evidence that he was agent for any such purpose, or that he was in any way authorized to waive the production of such a certificate. *Second.* It does not appear on what grounds the company refused to pay. It is consistent with all the facts proved that the company refused to pay for the reason that no such certificate was produced. *Third.* It does not appear that the company concealed anything from Bray. Moreover the production of the certificate was a condition precedent to the plaintiff's right to recover. He knew that such a certificate was required and that it had not been furnished.

These circumstances therefore, singly or collectively, do not furnish *prima facie* evidence of a waiver.

The policy provides, among other things, that “if the above mentioned premises shall be occupied or used so as increase the risk, * * or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured without the assent of this company indorsed hereon, * * then and in every such case this policy shall be void.”

The same clause in the policy also prohibits the use of naphtha; but another clause provides in writing that “the assured has permission to use naphtha in his business, but fire or lights are not permitted in the building, except a small stove in office.”

The evidence discloses that some time after the policy issued, an eighteen inch cylinder stove was placed and used in the finishing room in the building, in which there was usually or frequently a large quantity of inflammable naphtha gas. No argument is required to show that such a use of the building increased the risk.

Upon the plaintiff's own showing, therefore, he wholly

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failed to produce an essential piece of evidence, and did prove, affirmatively, a fact which conclusively defeats his right to recover; there being no proof that the company assented to it as the contract requires.

There is no error.

In this opinion the other judges concurred.

THE TOWN OF MARLBOROUGH *vs.* THE TOWN OF CHATHAM.

The act of 1878 (Session Laws of 1878, chap. 94, sec. 3,) provides that "all persons needing relief, who have no settlement in any town in this state, shall be state paupers, and shall, when needing relief, be provided for by the comptroller for the period of six months after they come into this state." Held, that the period intended, was the first six months of their pauperism, and not the first six months after their arrival in the state.

ACTION to recover for supplies furnished a pauper; brought to the Court of Common Pleas of Hartford County, and reserved, on facts found, for the advice of this court. The complaint contained three counts, the third of which alone related to the pauper in question—no question being made as to the others. The case is sufficiently stated in the opinion.

C. H. Briscoe and J. P. Andrews, for the plaintiffs.

S. A. Robinson, for the defendants.

PARK, C. J. No question is made in regard to the causes of action set forth in the first and second counts of the plaintiffs' complaint. In respect to them the defendants admit their liability.

The controversy is confined to the third count, in which the plaintiffs seek to recover of the defendants the expenses they have incurred in the necessary support of Michael

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Kelley, claimed to have been a state pauper, the burden of whose support, upon the facts of the case, is said to have been cast upon the defendants.

The facts with regard to the migrations of Kelley are as follows: He came to the United States from Ireland in the month of March, 1872, and in April of that year to the town of Portland, in this state, where he remained till June, 1873. In July, 1873, he came to the plaintiff town and remained there till April, 1879, when he removed to the defendant town, and remained there till April, 1880. He then returned to the plaintiff town, and remained there till September, 1880, when he became a pauper, and applied to the town for support, which was furnished him to the amount sought to be recovered of the defendants in the third count of the complaint.

During all the time that Kelley was in the state prior to September, 1880, he supported himself. The plaintiff town first applied to the state to support him as a state pauper, but it refused to receive him as such, and then the selectmen of the town in due time legally notified the defendants that Kelley was being supported at their expense.

It is clear from these facts that Kelley had no legal settlement in any town in this state, and much less in the defendant town; consequently, if the defendants are liable for his support, it must be upon some other ground than settlement in that town. This the plaintiffs seem to admit, for they refer us only to the twenty-first section of the statute of 1878, (Session Laws 1878, chap. 94,) as imposing this liability upon the defendants. That section is as follows:—"All state paupers, after the period of six months, as provided in section three of this act, shall be sent back to the town where they resided when they applied for relief, and said last mentioned town shall thereafter be chargeable for their support until they shall have gained a settlement in some other town; provided said paupers shall have had a residence therein for a period of six months or more prior to the time when they applied for relief; but if said paupers shall not have had such resi-

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dence in said town for the period aforesaid, and shall have had such residence in any other town in the state, said town in which they have last had such residence six months, or more shall be chargeable with their support. And if said paupers shall not have had a continuous residence in any town in this state for a period of at least six months, then the town in which they resided at the time they applied for relief, shall be chargeable with their support until they shall have gained a settlement in some other town in accordance with the provisions of this act." This section refers to section three of the same act. The part of that section important to the present case, is as follows: "All persons needing relief, who have no settlement in any town in this state, shall be state paupers, and shall, when needing relief, be provided for by the comptroller for the period of six months after they came into the state."

The plaintiffs claim that the period of six months during which the pauper is to be supported by the state, means the period of six months that first elapses after the pauper's arrival in the state; and that inasmuch as Kelley during this period supported himself, the state was under no obligation by this section to furnish him any support. The defendants claim that the period of state support mentioned in the section, means the first six months of pauperism, whenever that might happen to be, and that, inasmuch as the plaintiffs' complaint is confined wholly to this period of Kelley's residence in that town, the state itself is under obligation to remunerate the plaintiffs, and not the defendants.

Here is the turning point of the case. The claim of the plaintiffs is technical; and seems not to be based upon those considerations which must have induced the state to take upon itself the burden of furnishing support in the first instance to all those of the statute description needing relief.

It would seem that these considerations could not have been based upon a mere difference in the time when the relief should be needed, but rather upon the character of

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the burden which some municipal body must bear, and the urgent necessities of the case. What reason is there for the supreme power of the state to make a distinction in the support it furnishes between the case of Kelley, who became a pauper after sojourning in various towns of the state without acquiring a settlement in any of them, and that of a pauper who comes into the state needing relief in any town he may enter? In either case no statute, except the one in question, imposes any obligation upon any town in the state to furnish relief. The legislature was providing for a new burden in the passage of the statute, and regarded the state as in equity bound to bear some part of it before imposing the remainder upon others. There is no reason for the distinction urged by the plaintiffs, and we think the claim is unsound.

All persons needing relief, and having no settlement in any town in the state, are denominated state paupers by the third section of the statute. It can hardly be supposed that this is a mere name. A town pauper is one who is supported by a town, and for the same reason a state pauper must be one who is supported, to some extent at least, by the state, or else there is a misuse of the term. The case of Kelley comes within the statute definition of a state pauper; comes within the equity and reason of the statute; and we think brings him within the class to be supported by the state during the first six months of his pauperism.

Again, the twenty-first section of the statute, we think, makes it clear that the six months' support by the state means the first six months of pauperism, whenever that may be. "All state paupers, after the period of six months, as provided in section three of this act, shall be sent back to the town where they resided when they applied for relief, and said last mentioned town shall thereafter be chargeable for their support until they shall have gained a settlement in some other town, provided said paupers shall have had a residence therein for a period of six months or more prior to the time when they applied for relief." This clearly

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implies a taking of all state paupers by the state, the supporting of them during the period of six months, and then the sending of them back to the town from which they came, to be thereafter supported, provided they had resided therein six months or more. How could a pauper be sent back to the town, unless he had previously resided there? And how can the six months of support by the state be only the first six months following the pauper's entry into the state, when he may have resided six months or more in the town from which he came when he began to be supported by the state.

Furthermore, the statute speaks of the state's support as being for a fixed and definite period of six months; no more, and no less. But the claim of the plaintiffs fixes only the maximum limit, and says that the period may not be more than a week or a day. Still further, can it be said that this statute provides that a town shall be liable for the support of a pauper who has no settlement in any town in the state, simply because his last residence for the full period of six months or more has been had in that town? We think not. We think the six months' support by the state is an essential requisite and must precede such liability. And inasmuch as such support has not been had in the present case, we think the defendants are not liable; and we so advise the Court of Common Pleas.

In this opinion the other judges concurred.

JAMES G. BATTERSON vs. THE TOWN OF HARTFORD.

The act of 1877 (Session Laws, ch. 47,) provides that shares of the stock of insurance and various other corporations, owned by a resident of this state, shall be set in his tax list at their market value; but that if any portion of the capital is invested in real estate on which the company is assessed and pays a tax, the assessed value of such real estate shall be deducted from the market value of the stock. Held, that the assessed value of real estate owned by the company outside of this state, on,

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which it paid a tax in the state where situated, was to be deducted as well as that of real estate in this state.

And held that no deduction was to be made for United States non-taxable bonds held by the company.

The sum to be deducted, upon each share of the stock, in the tax list of a shareholder, should bear the same proportion to the market value that the entire investment in taxable real estate bears to the entire surplus of assets above liabilities.

APPEAL from the doings of the board of relief of the town of Hartford in a matter of taxation; taken to the Superior Court in Hartford county. The facts were found and the case reserved for advice. The case is sufficiently stated in the opinion.

R. D. Hubbard, for the plaintiff.

S. O. Prentice, for the defendant.

PARDEE, J. On October 1st, 1881, the chartered capital of the Travelers Insurance Company of Hartford stood at \$600,000, divided into six thousand shares. Not now regarding this capital as a liability, it had a surplus of assets beyond debts amounting to \$1,435,957⁶²₁₀₀, a portion of which was then invested in real estate in other states than this, on which it had paid taxes assessed during the previous year. Another portion was invested in real estate in this state. Neither the money paid in as capital nor the income therefrom can now be distinguished from the accumulated profits of the business, and therefore cannot be traced into the investment in real estate. Still another portion was invested in bonds of the United States, which were exempt from taxation. The Session Laws of 1877, chap. 47, § 1, provide that "shares of the capital stock of any bank, national banking association, or insurance, turnpike, bridge, or plank road company, owned by any resident of this state, shall be set in his list at their market value, in the town in which he may reside; but so much of the capital of any such company as may be invested in real estate, on which it is assessed and pays a tax, the assessed value

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of such real estate shall be deducted from the market value of its stock, in its returns to the assessors." The plaintiff owned fifty shares, and he requested the assessors to allow such proportionate reduction from the market value as he might be entitled to upon these facts. The assessors made a reduction for the investment in real estate in this state, but refused to make any for that in real estate in other states or in United States bonds. He appealed to the Superior Court; and that court asks our advice.

First, as to the claimed exemption upon bonds of the United States. The tax is not upon the property of the corporation; it is explicitly upon the shares; that is, upon the right of the shareholder to receive his proper portion of net profits earned by the exercise of the corporate franchise, and of assets remaining after payment of debts upon dissolution. That he is not the owner of any portion of the government bonds or of any other property held by the corporation; that his right is a distinct and independent property in himself, quite separate from the ownership by the corporation of its assets; and that the state may assess a tax against him upon it at its full value, notwithstanding the fact that the corporation is the owner of untaxable government securities, is so firmly established by judicial determination that it is not now to be considered an open question. *Van Allen v. Assessors*, 3 Wallace, 573; *People v. Commissioners*, 4 id., 244; *National Bank v. Commonwealth*, 9 id., 359.

Second, as to the exemption of real estate taxed in other states. The question here is, what is exempted by the statute? The words are, "so much of the capital of any such company as may be invested in real estate on which it is assessed and pays a tax;" and there is no limitation as to its location. The defendant insists that whenever the legislature uses the expression "real estate" in connection with the subject of taxation, it is by virtue of an unvarying rule of interpretation to be held as if there were added to it the words, "in this state." But, first, these are not words of taxation, they are words of exemption; they

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specify the measure of relief to be given to the shareholder paying a tax upon his right to receive dividends from profits accruing to a corporation when the property which earns the dividends is otherwise taxed. And again, in the act of 1872, (Gen. Statutes, p. 170, § 16,) the legislature, in behalf of mutual insurance companies, exempted the amount invested in real estate liable to "taxation in this state;" not deeming the words "real estate" sufficient to convey its meaning. The form of this exemption in the Session Laws of 1872, chap. 88, was this: "Real estate which is required to pay town or city taxes in this state;" and the revisers brought the limitation "in this state" into the revision of 1875. The act of 1868, (Session Laws of 1868, chap. 68,) permitted railroads to deduct "real estate * * not used for railroad purposes, located in this state," from the market value of their stock. In the revision of 1875, p. 168, § 6, the words "located in this state" do not appear. But we are unable to say whether the legislature thought them superfluous or intentionally removed a restriction. In the act of 1881, (Session Laws of 1881, chap. 49, § 3,) the legislature in behalf of each mutual insurance company allows an exemption to the extent of the "market value of its real estate liable to taxation in this state," repeating the limitations of 1872 and 1875.

Therefore, in this matter of granting exemption, the legislature has not so long, so often, and so invariably, used the words "real estate" in instances in which we have been made judicially to know that it intended only real estate in this state, as that the suggested rule of interpretation has the force of a statute. We think that the plaintiff is entitled to the exemption precisely as the legislature has written it.

The corporation had assets beyond debts to a certain amount. This surplus stands as its capital in the sense in which that word is used in the statute under consideration; presumably the market value of its shares rests upon it; a portion of it is invested in real estate paying taxes in this state and in other states. The legislature intended to

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relieve the shareholder from the assessment upon the value of his right, so far as any portion of that surplus of corporate property which was the foundation of the market value was invested in real estate and had paid a tax. Therefore the Superior Court is advised that the deduction to be made in behalf of the plaintiff upon each share of his stock should bear the proportion to the market value, which the investment in real estate bears to the surplus of assets; and that the investment in government bonds does not entitle him to any deduction.

In this opinion the other judges concurred.

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WALLACE E. PECK'S APPEAL FROM PROBATE.

The revocation of a former will by the mere execution of a later one, is ambulatory, and does not take effect till the second will becomes operative by the death of the testator.

And the revocation of the second will will revive the former.

How it would be where the second will in express terms revokes the former:

Quere. The weight of authority is in favor of the doctrine that the revoking clause does not take effect till the will becomes operative by the death of the testator.

The question is materially affected by the statute of 1821 with regard to the revocation of wills, which was passed since the decision of this court in *James v. Marvin*, 3 Conn., 576.

That statute has been somewhat changed in its phraseology, in the later revisions, but without essentially changing its meaning.

APPEAL from a decree of a court of probate disallowing a document offered as the will of Lucy A. Peck; taken to the Superior Court in Hartford County, and tried to the court before *Hovey, J.* Facts found and probate decree affirmed, and motion in error by the appellant. The case is sufficiently stated in the opinion.

H. S. Barbour and *C. W. Gillette*, for the plaintiff in error, cited 1 Wms. on Exrs., 197; 1 Jarm. on Wills, 136;

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2 Am. Lead. Cas., 482; 1 Redf. on Wills, 308, 328, 330, 375; 4 Kent Com., 531; *Goodright v. Glazier*, 4 Burr., 2512; *Harwood v. Goodright*, Cowp., 87, 92; *Welch v. Phillips*, 1 Moore P. C. C., 299, 302; *Cutto v. Gilbert*, 9 id., 131; *Brown v. Brown*, 8 El. & Blackb., 875; *In re Brown*, 4 Jur. N. S., 244; *Belden v. Carter*, 4 Day, 66; *Witter v. Mott*, 2 Conn., 67; *James v. Marvin*, 3 id., 576; *Card v. Grinman*, 5 id., 164, 168; *Boudinot v. Bradford*, 2 Dall., 266; *Lawson v. Morrison*, id., 286; *Colvin v. Warford*, 20 Maryl., 357; *Marsh v. Marsh*, 3 Jones Law, 77; *Flintham v. Bradford*, 10 Penn. St., 82, 90; *Randall v. Beatty*, 31 N. Jer. Eq., 643; *Matter of Simpson*, 56 How. Pr. R., 125; Conn. Civil Officer, (ed. 1880,) 400.

R. D. Hubbard and *F. L. Hungerford*, for the appellees, cited Gen. Statutes, p. 370, § 7; 1 Jarman on Wills, (5th ed.,) 336; Powell on Devises, 535; 2 Archb. N. P., 441; 1 Redf. on Wills, 350, 351, 361, 364; 2 Greenl. Ev., §§ 681, 683; 4 Kent Com., 650; *Brown v. Brown*, 8 El. & Blackb., 885; *Moore v. Moore*, 1 Phill. Eccl. R., 406, 412; *Powell v. Powell*, L. Rep., 1 Prob. & Div., 209; *Wood v. Wood*, id., 309; *Dempsey v. Lawson*, L. Rep., 2 Prob. Div., 98; *Belden v. Carter*, 4 Day, 75; *Witter v. Mott*, 2 Conn., 67; *In re Johnson's Will*, 40 id., 588; *Laughton v. Atkins*, 1 Pick., 545; *Jones v. Murphy*, 8 Watts & Serg., 275, 295; *Rudy v. Ulrich*, 69 Penn. St., 177, 183; *Walton v. Walton*, 7 Johns. Ch., 269; *Ludlum v. Otis*, 15 Hun, 413; *Bohanon v. Walcott*, 1 How. (Miss.), 336; *Smith v. McChesney*, 15 N. Jer. Eq., 359; *Exr. of Larrabee v. Larrabee*, 28 Verm., 274; *State ex rel. Brown v. Crossley*, 69 Ind., 203, 211.

CARPENTER, J. In 1875 Lucy A. Peck made a will, which was duly executed. In 1880 she made another, which was inconsistent with the former. Not long afterwards she died. The later will has never been found; the former was carefully preserved by her and found among her valuable papers after her death. The testatrix was advised by the scrivener who wrote the last will to destroy the first; but it

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was not done, and when he left the room the two wills were lying upon the table. No one now living knows of the existence of the last will after that time.

Upon these facts the Superior Court, as a conclusion of law, found the issue for the appellees, and affirmed the judgment of the court of probate rejecting the first will. The case is before us on a motion in error.

The defendants in error contend that the execution of the latter will operated immediately as a revocation of the former, and that the former was not revived by the destruction of the latter. The Superior Court sustained this claim.

Prior to 1821 any will might be revoked in writing, and it was not necessary that the writing should be executed with every particular formality. It was then held that a revocation contained in another will was not ambulatory, but took effect immediately, and that the will revoked could not be revived without a re-publication. *James v. Marvin*, 3 Conn., 576. In 1821 a statute enacted that "no devise of real estate shall be revoked otherwise than by burning,

* * or by some other will or codicil in writing, declaring the same, signed by the testator in the presence of three or more witnesses, and by them attested in his presence." That section required that a written revocation should be in another will; and so the law continued until the revision of 1849, in which the words "declaring the same" were omitted and have not since appeared in the statute. In that revision the section concluded as follows—"or by some other will or codicil duly executed according to this act."

In 1875 the phraseology was further changed, so that the whole section now reads—"No will or codicil shall be revoked, except by burning, canceling, tearing, or obliterating it by the testator, or by some person in his presence, by his direction; or by a later will or codicil." The change in the words however did not change its meaning, so far as it relates to the question now under consideration.

Prior to 1821, as well as since, the law was so that a later will when it took effect by the death of the testator revoked a prior inconsistent one. That proposition is not ques-

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tioned. If *James v. Marvin* is an authority before the statute, a subsequent will, containing no revocatory clause, did not, during the life time of the testator, revoke a prior will. In respect to that point we do not think the statute was intended to make any change.

"In the case cited the court in fact decided two questions:—1st, that a clause in a will revoking former wills took effect immediately; and 2d, that if the subsequent will contained no such clause it did not affect former wills until it became operative. The first question was directly before the court, the second was only incidentally involved.

Now the second question is directly raised and the first is incidentally involved. In the former case the statute was not in force, now it is. The statute comes before us now for the first time for a construction. And it must be remembered that the statute changes the aspect of the first question. It is not now what it was when *James v. Marvin* was decided. Then any written declaration to that effect revoked a will irrespective of any statute and without regard to the death of the testator. Now the statute requires that the writing, in order to have that effect, must itself be a will or codicil, and executed with all the formalities required for such instruments. Under the statute it may be claimed, and the claim sustained by very respectable authorities, and supported by reasoning of considerable force, that the will, even though it contain a clause expressly revoking former wills, must take effect as a will before the revoking clause will be operative. Thus it will be seen that this precise question as it now presents itself was not decided in *James v. Marvin*, and has never been decided by this court. We do not propose to decide it now, but as it is very difficult to consider fully and satisfactorily the real question in this case without discussing to some extent the other question, we will briefly refer to the state of the law on that question.

The law as laid down by HOSMER, C. J., relating to the effect of a revoking clause in a subsequent will, is questioned by an eminent writer on the law of wills.



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1 Redfield on Wills, 328. After referring to the Connecticut case he says—"This doctrine has an air of plausibility, from the fact that an instrument of revocation alone would unquestionably have this effect. But that would show a present purpose of becoming intestate, carried into effect as far as practicable before death. But the making of a will, with a revocatory clause, is made dependent, in some sense, upon the subsequent will going into operation. And there is ordinarily no purpose of having the revocatory clause operate except upon that condition. The whole instrument is, therefore, ambulatory, and when destroyed it all ceases to have any operation." And such seems to be the doctrine of *Laughton v. Atkins*, 1 Pick., 535, *Reid v. Bolland*, 14 Mass., 208, *Simbery v. Mason & Hyde*, Comyns, 451, *Hyde v. Hyde*, 3 Chan. Rep., 155, and *Onions v. Tyrer*, 2 Vern., 742.

On the other hand *James v. Marvin*, we are inclined to think, has been regarded as law by the profession under the statute for more than sixty years. And there are many other cases which seem to assume that such is the law without directly deciding the point.

The weight of authority seems to be in harmony with the views expressed by Mr. Redfield. We refer to it not for the purpose of deciding the point, but for the purpose of applying the reasoning and the authorities cited to the point we are now considering; and we think they apply with much greater force to a will not containing the revocatory clause. We are decidedly of the opinion that if we hold that the execution of the second will operated to revoke the first, we shall go counter to the prevailing current of authority, and produce a greater discordance between our own law and the laws of other jurisdictions than now exists; a result certainly which it is desirable to avoid.

We also think that to be the most reasonable view. The testatrix by executing the second will evinced no intention to become intestate, but rather a contrary intention. By destroying the last will and carefully preserving the first she affords satisfactory evidence that she intended until the

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very last to die testate, and that that should be her will. In the absence of an express provision to that effect we cannot presume that the legislature intended that the mere execution of a will should in all cases revoke a prior will. Such a construction would in many cases defeat the manifest intention of the testator. The statute requires a "later will or codicil." We think that means an operative will or codicil.

In *James v. Marvin HOSMER*, C. J., says:—"The revocation effected by a will *merely* is not instantaneous, but ambulatory until the death of the testator; for although by making a second will the testator intends to revoke the former, yet he may change his intention at any time before his death." This doctrine is consistent with the statute; and although the case did not call for it, yet it has been understood to be the law of this state for more than sixty years. We see no reason for changing it, even if the law in some jurisdictions is different.

We would say however that we have carefully examined the cases cited by the counsel for the appellees, and find that many of them are cases in which the later wills became operative as wills; and of course the language of the courts must be interpreted with reference to that circumstance, and cannot properly be applied to a case like this.

The judgment of the Superior Court was erroneous and is reversed.

In this opinion the other judges concurred.

THE CONTINENTAL LIFE INSURANCE COMPANY *vs.* ABBIE H. BARBER AND ANOTHER, EXECUTORS.

To discharge a surety by giving time to the principal, the creditor must have put it out of his power for the time to proceed against the principal. A note of \$8,000, which was indorsed by *B* for the accommodation of the maker, with waiver of notice, fell due and was not paid. The maker

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soon after paid \$4,000, and gave his note on demand for \$4,000, payable to the order of the holder of the original note, with interest payable semi-annually, and secured it by a mortgage, the indorser having no knowledge of the transaction. This note and mortgage the holder accepted as additional security for the balance of the original note. Held not to discharge the indorser.

The facts that the collateral note was secured by a mortgage, and that it was on interest payable semi-annually, did not affect the case. There still existed the right to sue at any time on the original note.

Where an indorsement is made with "notice of protest waived," it is a waiver of notice of non-payment.

The statute of limitations bars a suit upon a promissory note unless brought within six years. Another statute requires that a suit be brought by a creditor of a solvent estate within four months after a refusal of payment by the executor or administrator. A note was presented to the executors of a deceased person, the estate being solvent, within six months limited by the probate court for the presentation of claims, and on refusal of payment by the executors suit was brought against them upon it within four months after such refusal. At this time more than six years had elapsed since the right of action first accrued. Held that the suit was not barred.

ACTION upon a promissory note; brought to the Superior Court in Hartford County. The defendants pleaded the statute of limitations, and that the indorser (of whom they were executors) had been discharged by time given the maker. The case was tried to the court before *Hovey, J.* Facts found and judgment rendered for the plaintiffs. The defendants appealed. The case is sufficiently stated in the opinion.

T. M. Maltbie, for the plaintiffs.

G. G. Sill, for the defendants.

CARPENTER, J. This is an action against the executors of the estate of the late Gardner P. Barber, deceased, who, when in life, indorsed a note for \$8,000. The Superior Court found the facts and rendered judgment for the plaintiff. The defendants appealed. The record presents three questions.

1. Was the indorser discharged by the act of the plaintiff? The note fell due July 20th, 1874. On the 22d of October,

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1874, the maker paid \$4,000, which was duly indorsed on the note. In December following, being urged to pay the balance, and not being able to do so, he executed another note for the sum of \$4,000, payable to the order of the plaintiff, on demand with interest semi-annually, and executed a mortgage of certain real estate to secure the payment thereof; and, having caused the same to be recorded, delivered it with the note to the plaintiff, without the knowledge of Barber. The plaintiff accepted the note and mortgage as additional security, but not in payment or satisfaction of the original note or any part thereof.

The claim is that the legal effect of accepting the note and mortgage was to give time to the maker of the note for \$8,000, and so discharge the indorser.

The law is well settled, hardly requiring repetition, much less the citation of authorities, that in order to discharge the indorser by giving time to the maker there must be a contract to that effect, express or implied; that is, the holder must have put it out of his power for the time being to proceed against the maker. The indorser cannot be deprived of the right, even for a short time, to pay the holder and proceed forthwith against the maker for his indemnity. The holder may not, during the time for which he has agreed to extend credit, bring a suit, for that would be a breach of his contract. He may not accept payment from the indorser and thereby subject the maker to an immediate suit by the indorser, for that would violate, if not the letter, certainly the spirit of his contract. Hence such a contract operates to discharge the indorser.

But here is no express contract, and we think none can be implied. It is expressly found that the second note was taken as additional security for the balance due on the original note and not in satisfaction of it nor as a substitute for it. Both notes were liable to be sued at any time, the one being overdue and the other on demand. Of course the indorser could have paid the first note and could at once have brought a suit against the maker. He was also entitled to the additional security, and could at once have

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brought a suit on that note, and could also have proceeded to foreclose the mortgage. Instead of being prejudiced by the transaction it was, in theory at least, a benefit to him.

The only features of the transaction which give any color to the defendants' claim are the facts that the collateral note, although on demand, was on interest payable semi-annually, and was secured by a mortgage; and it is urged with considerable force that these circumstances indicate an understanding between the parties that that note was to run at least for six months. They certainly indicate that the parties contemplated that it might run six months, but that possibility does not change the character of the note and convert it from a note payable on demand to a note payable on time. It was still a note due presently, and might be sued at once by the payee, and the indorser of the prior note might at any moment have placed himself in a position to sue it.

The supposed analogy to notes ordinarily taken by savings banks, insurance companies, &c., does not hold good. The object in those cases is to loan money, to make investments; the object here was to give additional security to a loan previously made and long since overdue, and which, we may add, was of a doubtful character. In the former cases the payee contemplates a present loan of money to continue for an indefinite time in the future; in the latter he is endeavoring to collect a loan previously made. It may be a breach of fair dealing to attempt to collect a note of the former description at once, but it by no means follows that it would be such a breach to attempt to collect one of the latter description. Moreover, the very object of making a note payable on demand is that the holder may collect it at any time if he sees good reason for doing so; and, legally speaking, he is the sole judge of the sufficiency of the reason; and that applies to the notes referred to as well as to the note in this case; so that the analogy, even if it exists, or so far as it does exist, does not avail the defendants.

2. The defendants' intestate, when he indorsed the note, wrote over his signature the following words—"Notice of

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protest waived." The defendants contend that the waiver does not dispense with presentment for payment and a demand therefor. This may be conceded for the purposes of this case, for the court below has found that when the note became due "it was presented for payment at the office of the plaintiffs in Hartford, where the same was payable, and payment was then and there required and refused."

The claim that the indorser, notwithstanding the waiver, was entitled to notice of non-payment, cannot be sustained. A protest, being evidence of presentment for payment and a demand and refusal, in mercantile language stands for the thing which it proves; so that when notice of protest is waived notice of that which a protest signifies is waived.

3. It is insisted that the plaintiffs' claim is barred by the statute of limitations. Within six years after the right of action accrued the indorser died. The court of probate, pursuant to the statute, allowed six months for the presentation of claims. Within that time this claim was presented. Another statute requires a creditor to commence a suit against the estate within four months after notice that his claim is disallowed. This suit was commenced within that time, but when it was commenced more than six years had elapsed from the time the right of action first accrued.

We think the claim is not barred. The statutes relating to the settlement of estates were manifestly designed to put all claims upon an equal footing. Their practical effect is to bar some claims in a much less time than the general statute does, and in other cases, as in this case, the time may be somewhat extended. The extension of time however can do no injustice, and is not a sufficient reason for having different claims against the same estate governed by different statutes. It is much better that the same statute and the same principles should govern all alike.

This question was determined by this court adversely to the defendants in *Bradley v. Vail*, 48 Conn., 375. We refer to the reasons there given without repeating them here.

There is no error in the judgment of the court below.

In this opinion the other judges concurred.

Barnes v. Barnea.

JAMES BARNES vs. GEORGE A. BARNES.

A father has the right to dispose of the services of his minor son during his minority; but this right is not absolute. His own right to his services being limited and qualified he can convey only a limited and qualified right.

One qualification of this right is, that it dies with the death of the father. The son being emancipated by the death of the father, his obligation to perform the contract made for him by the father is at an end; certainly after he has arrived at years of discretion.

A father made an agreement with *B* that his son, then four months old, should live with and serve him till he was twenty-one years old, and that *B* during that time should provide him with food, clothing and schooling as if he were his own child. The boy's mother was then dead and his father died four years later. When the boy was nineteen years of age he made an agreement with *B* that the latter should relinquish his rights under the contract with the father, and should be released from the duty of further supporting him, and that he would thereafter pay *B* three dollars a week for his board while he remained with him. Held—1. That this agreement was a repudiation by the minor of the contract made between the father and *B*.—2. That the board furnished the minor by *B* being a necessary, he could recover reasonable compensation for it.

CIVIL ACTION to recover for board furnished the defendant, a minor; brought to the Court of Common Pleas of Hartford County, and tried to the court before *Bennett, J.* Facts found and judgment rendered for the plaintiff, and appeal to this court by the defendant. The case is sufficiently stated in the opinion.

C. E. Perkins and N. E. Pierce, for the appellant.

J. P. Andrews, for the appellee.

CARPENTER, J. When the defendant, George A. Barnes, was about four months old, his father and the plaintiff entered into a contract in writing in which the father agreed that George A. should serve the plaintiff faithfully during his minority—the plaintiff agreeing to provide for him during that time suitable food, clothing and schooling. Pursuant to this agreement the defendant lived with the plaintiff

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until he was about nineteen years old, when he and the plaintiff agreed that the contract should not be binding, that he should thereafter be entitled to his earnings, and that the plaintiff should be entitled to receive three dollars per week for his board while boarding with him. Of this agreement due notice was given to Fenn, the other defendant, who had been appointed guardian to the said George A., the father having died when he was about four years old.

The court below found that the defendant was indebted to the plaintiff in the sum of \$297, and rendered judgment for that sum.

On the trial the defendant claimed, as matter of law, that the contract between the plaintiff and the father of the defendant was a valid contract and could not be abandoned by the agreement between the plaintiff and George A. Barnes. The court ruled otherwise and the defendant appealed.

That a father has a right to dispose of the services of his minor son during minority is not disputed; but this right is not absolute. As his right to the services of his son is limited and qualified, it necessarily follows that he conveys only a qualified right. The more important qualification, and the only one we need now to refer to, is, that the father's right to the services of his son dies with the father. That event emancipates the son, and his obligation to perform the contract made for him by the father is at an end. In this case, the father being dead, the son was at liberty to repudiate the contract, certainly after arriving at years of discretion.

The question is not whether the minor was legally capable of making a valid contract with the plaintiff, but it is rather whether that agreement amounted to a repudiation of the contract made with the father. We are clearly of the opinion that it did.

It will be observed also that this case differs from those cases, cited by the defendant's counsel, in which the minor during the lifetime of the father attempted to repudiate the contract made by the father. Hence those cases have no application.

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The contract having been repudiated by the minor ceased to be of obligation on either party, and the plaintiff was no longer liable to furnish support to the minor. He therefore has a right to recover for the board furnished, that being a necessary which the minor could lawfully bind himself to pay for. It does not follow that any contract which the minor might have made for his board would be enforced by the court, as he might have made an improvident one; but in this case it is clear that the amount which he agreed to pay was only a reasonable one, and we must assume that the court below so regarded it.

There is no error in the judgment.

In this opinion the other judges concurred.

**MARY L. SIMMONS *vs.* CHARLES H. HUBBARD AND
OTHERS, EXECUTORS AND TRUSTEES.**

A testator, leaving a large estate and no children, gave to a sister all the income of the property during her life, and after her death an annuity of \$1,400 a year with the use of his dwelling house to a niece, and after some further small bequests the residue of his estate for the establishment of a school. By a codicil made later on the same day that the will was made, he gave to *S* for her life \$350 a year. Held, that this annuity began to run from the death of the testator, and not from the death of the sister to whom he had given the whole income for life.

Held also, that the deferred payments would draw interest.

And held that, in a suit brought by *S* against the trustees, in which the plaintiff asked for a judgment giving a construction to the will, and for a recovery of the amount due to her under it, the expenses of the litigation were not to be taken out of the estate, but only ordinary costs taxed.

CIVIL ACTION against the executors of and trustees under the will of Isaiah Pratt, to recover the amount of an annuity given the plaintiff, and praying for a construction of the will and an allowance of all the costs of the litigation out of the estate; brought to the Superior Court in Middlesex County. Facts found and case reserved for advice. The case is sufficiently stated in the opinion.

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L. E. Stanton, for the plaintiff.

J. Phelps, for the defendants.

PARDEE, J. Isaiah Pratt of Essex died in 1879, aged sixty-five, childless and unmarried, disposing of an estate amounting to about \$93,000 by a will dated in 1875. Of the legatees named therein Mary Pratt is his sister, a widow and about seventy-eight years of age; Mary L. Simmons and Mary Simmons were friends.

By the second and third clauses of the will the testator bequeathed his entire estate to trustees, who are directed to pay the income therefrom to his sister Mary Pratt, semi-annually during her life; by the fourth and fifth, after her death to pay an annuity of fourteen hundred dollars to his niece Mary P. Nott, with the use of his dwelling house while she remains unmarried; by the sixth to expend five hundred dollars in fencing a burial lot and thirty-five dollars annually upon the lot and fence; by the seventh to insure and repair the dwelling house; by the eighth to expend three hundred dollars annually for instruction in singing; by the ninth to expend annually the remainder of the income for the support of a school. By a codicil executed upon the same day he directs the payment of three hundred and fifty dollars annually to the plaintiff, Mary L. Simmons, during life.

She asks the court to compel the trustees to pay the annuity from the death of the testator; and the case is reserved for the advice of this court.

The defendants insist that the will and codicil are to be construed as one instrument; that if possible all provisions shall be operative; that a clearly expressed intention is not to yield to an ambiguous one; that the next of kin are not to be disinherited without an express devise or necessary implication; that when the general intent is clear and it is impracticable to give effect to all of the language of the will expressive of some special intent, the latter must yield to the former; that when the intention of the testator is

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ascertained with reasonable certainty, it shall absolutely govern; and that the bequest to the plaintiff, read in the light of these rules, is not to take effect until the death of Mary Pratt.

The bequest is of an annuity; of a payment for every year of the annuitant's life, reckoning from the day of the creation of the annuity, there being no postponing clause. The will speaks from the death of the testator; that event brings the annuity into existence. It is expressed to be for the life, and therefore for every year of the life, of the donee. It is conceded by the defendants that the annuity will be payable after the death of Mary Pratt. But in the will proper the income from the entire estate is after that event appropriated to other uses; and this supposes the preservation of the capital intact; therefore the bequest of the annuity by the codicil is in direct conflict with that for the school. Both cannot stand; whatever shall be paid to the annuitant must be taken from a fund previously devoted to some other use; it is to be taken either from Mary Pratt, or from the school, or from both. The rules of construction brought to our notice are as appropriately and as completely the defence of the school against the annuitant as they are of Mary Pratt; and yet it is admitted that they are no defence at all for the school.

It is quite certain that, immediately upon the execution of the will, it came to the mind of the testator that he had disposed of his whole estate in forgetfulness of two friends; of two women; one of whom he had habitually spoken of as his niece and whom he had from time to time pecuniarily assisted, and for both of whom he desired to make provision after his death; that he determined so to modify the will at once as to make it express his intention in their behalf; that he adopted the easy method of the codicil; that he did not intend to write anything which could stand in the presence of his gift to Mary Pratt and of that to the school; that he did intend to write something directly in conflict with one or both—to diminish one or both in behalf of the annuitant; in short, that he intended

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to put the codicil to its appropriate use, namely, to change some provision in the will. The bequest to the annuitant stands neither upon inference nor construction; it is framed of words as positive and unambiguous as is that to Mary Pratt; and it is no more certain that the testator intended to give to the latter merely the entire income than it is that he intended to make a small gift to the former; in this respect neither bequest takes precedence of the other.

There is no disinheritance of the heir in behalf of strangers in a sense and to a degree offensive to the law, for the estate exceeds \$90,000; the testator is childless; the annual income of a sister is in a small measure reduced in behalf of a friend. We are forced, therefore, to give the annuity place in the testator's plan for the distribution of his estate; to diminish either the absolute gift to Mary Pratt, or the absolute gift to the school, or both. The testator has suggested no distinction; on the contrary, he has used clear words, the legal effect of which is to diminish both; and it is to be noticed that he well knew how to protect the bequest to his sister from the effect of any other which he might make, when such was his desire; for he was careful to provide explicitly that the annuity to Mary P. Nott should not take effect until after the death of his sister. In expounding a will the meaning of plain words is the testator's intention; and that intention must be the law of the case.

There is no propriety in allowing the expenses of the litigation to be taken out of the estate.

The Superior Court is advised that the annuity became payable to the plaintiff during each year of her life subsequent to the death of the testator; that deferred payments draw interest; and that costs are to be taxed only as in an ordinary action at law.

In this opinion the other judges concurred.

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State v. Gaul.

SUPREME COURT OF ERRORS.

HELD AT BRIDGEPORT, FOR THE COUNTY OF
FAIRFIELD,

ON THE SECOND TUESDAY OF MARCH, 1883.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, Js.

THE STATE *vs.* ISAAC GAUL.

The act of 1879, (Session Laws, 1879, ch. 44,) provides that "any person who shall ravish and carnally know any female of the age of ten years or more against her will and consent, or who shall carnally know and abuse any female child under the age of ten years, shall be imprisoned in the state prison, &c." Held, that in an indictment charging a rape, it is not necessary that it be alleged that the person on whom it was committed was of ten or more years of age.

And that it is sufficient to allege that it was "against her will," that allegation being equivalent to "against her will and consent."

INDICTMENT for rape; in the Superior Court. Tried to the jury before *Beardsley, J.* Verdict guilty; motion in arrest of judgment for the insufficiency of the indictment; motion overruled, and appeal by the defendant to this court. The case is fully stated in the opinion.

J. C. Chamberlain, for the plaintiff in error.

F. L. Holt, for the State.

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GRANGER, J. The defendant was convicted in the Superior Court of a rape upon the person of one Lucy Bates, and after a motion in arrest for the insufficiency of the indictment had been overruled, he appealed to this court on the same ground.

The indictment is in the usual form for that offense at common law as well as under our statute, except in that it alleges that the act was done "against her will," instead of "against her will and consent," which the defendant contends are not equivalent, and that a distinct allegation of the want of consent is indispensable. But we cannot regard this fuller allegation as expressing anything more than the allegation "against her will." Surely if it was against her will it was against her consent, and if done against her consent was presumably against her will. The two words are substantially synonymous when used in this connection, and either without the other is sufficient. Indeed the word "consent" is spoken of by some legal writers as the less comprehensive of the two. Wharton's Am. Crim. Law, § 1141. The form in Swift's Digest contains only the word "will." 2 Swift's Dig., 826.

But the defendant contends that the act of 1879, (Session Laws, ch. 44,) which changes the range of punishment which may be inflicted for the crime, and makes a distinction in the matter of consent between the case of a female of the age of ten years or more, and that of a female child under ten years, makes it necessary that the indictment should state whether the person on whom the offense has been committed is of ten years or more of age, or is under that age. But this allegation can not be important where, as here, the act is charged to have been done against the will of the person. If she had been under ten years of age that fact would make it unnecessary to prove that the act was against her consent, and it might with more reason be claimed that the indictment should in that case allege the fact that she was under ten that the defendant might know that the state would not take upon itself the burden of proving the want of consent; but where the indictment

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alleges that the act was done against her will the state gives notice by the allegation that it takes upon itself the proof of that fact. There has always been a distinction made between persons of the age of consent and those not so, and while ten years of age has generally been treated as marking the lowest limit of the age of consent, yet the common law rule includes persons of greater age where from special immaturity or incapacity they were still unable to give what the law would regard as consent. Our statute merely fixes definitely the age of ten as that of capacity to consent. The statute may be regarded as substantially in affirmation of the common law, simply applying in a definite way a well-settled common law principle as to the application of which in particular cases there was room for uncertainty. This being so, there is no reason why an indictment for rape at common law should not be good for an indictment under our statute, where the offense has been committed on a person of ten or more years of age.

The indictment is sufficient and there is no error.

In this opinion the other judges concurred.

THE STATE OF CONNECTICUT *vs.* EDWARD T. WRIGHT
AND ANOTHER.

The defendants, *W* and *M*, one as principal and the other as surety, gave bond to the state in \$5,000 that *W* should faithfully discharge the duties of county commissioner. By statute it was a part of the duties of the board of county commissioners, which consisted of three members, to act upon the granting of licenses for the sale of liquors in the several towns of the county, and to receive and pay over to the towns the fees paid upon the granting of such licenses. After *W* had assumed the office his associates made him treasurer of the board, and as such he received money paid for licenses, and appropriated to his own use over \$5,000 of it. In a suit brought by the state on the bond it was held—

1. That *W*'s acts as treasurer were covered by the bond.
2. That, the statute (Acts of 1877, ch. 129,) requiring the bond to be given to the state, the action could be maintained by the state.

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M, the surety, filed a cross-complaint asking that the other commissioners be made parties defendant, and that, if a judgment was rendered against him, he might have judgment against them for their proportionate share of the damages. Held that it could not be entertained.

The Practice Act does not permit a defendant to bring in as co-defendants parties whose legal relation is only to himself, and whose presence or absence can not affect the judgment to be rendered as between himself and the plaintiff.

CIVIL ACTION on a bond given to the state for the faithful discharge by the defendant Wright of his duties as county commissioner; brought to the Superior Court. Cross-complaint filed by the defendant Mead, surety on the bond. Demurrer to cross-complaint by plaintiff. Demurrer sustained, and cross-complaint dismissed. Facts found and judgment rendered by the court (*Beardsley, J.*,) for the plaintiff. Appeal to this court by the defendant Mead. The case is sufficiently stated in the opinion.

J. B. Curtis and L. Warner, for the appellant.

L. D. Brewster and S. Tweedy, for the appellee.

E. W. Seymour, for certain parties cited in on the cross-complaint.

PARDEE, J.—On June 29th, 1878, the defendants, E. T. Wright as principal and Thomas A. Mead as surety, executed their bond to the State of Connecticut in the penal sum of \$5,000, upon condition that the said Wright should faithfully discharge the duties of the office of county commissioner for Fairfield County for the period of three years from July 1st, 1878. In the last named month Wright was by his two associate commissioners made custodian of the money paid to them under the statute for licenses to sell spirituous liquors. Of such money during the year next ensuing he received and misappropriated more than \$5,000. The state instituted this suit upon the bond and had judgment for the sum named therein. The defendant Mead appealed.

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It is his claim that the commissioners acted in two distinct spheres, one public and general, the other incidental; and that the default of his principal is in the latter and not covered by the bond. But before the time of its execution a public act had imposed upon county commissioners the duty to receive money for licenses granted and pay the same to the treasurers of the several towns entitled thereto; upon each one of them the duty to account for all money entrusted to his official keeping. The undertaking of the surety is that his principal shall faithfully discharge the duties of his office "in all respects, according to law;" excepting nothing; including everything. Moreover, the fact that the statute requiring the bond is later than that making them custodians of this money, would seem to indicate legislative intent to secure fidelity in this very matter. And if we were to classify their duties, faithful accounting for money received officially would seem to be public and general in the highest degree.

In answer to the claim that the state can not maintain this action, we reply that the legislature is supreme in the matter of granting these licenses, and of the reception, keeping and disbursement of the money received therefor. It required, as it had power to do, that the bond securing the fidelity of a public officer to his duty in this regard should be taken to the state; (Acts of 1877, chap. 129;) it follows that upon breach the penalty might be sued for and recovered by it upon a trust expressly named in the statute. There is therefore special legislative warrant for the form of the bond and for the present action. That the state will discharge its duty to the *cestuis que* trust is to be assumed.

The defendant surety filed a cross-complaint, in effect asking, first, for stay of proceedings until the plaintiff should obtain judgment against Wright and each of the other two commissioners and enforce payment thereof against one or both of them; and second, that in the event of a judgment against himself he should have judgments against those commissioners and their respective sureties for the propor-

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tionate amounts which in equity or at law they shall be adjudged to pay as damages for the amount misappropriated by his principal; making them and their sureties parties. The court sustained a demurrer to this cross-complaint.

If we should concede that the defendant surety has a cause of action against two county commissioners for negligence in permitting the third, his principal, to have possession of the money paid for licenses, there is no error in denying his motion. His bond guarantees the fidelity of Wright; it concerns himself, Wright and the plaintiff only; it has no legal connection with, and therefore can not be affected by, any undertaking by or in behalf of either of the other commissioners; the amount of his indebtedness to the plaintiff by reason of his bond can not be diminished by the fact of the existence of such claim.

The Practice Act does not permit a defendant to burden a cause and delay its progress to a conclusion by citing in parties whose legal relation is only to himself, and by raising for determination issues which can by no possibility affect the judgment to be rendered. The permission given to him to secure the presence of co-defendants rests not at all upon the ground that it is for his advantage, but solely upon the fact that in their absence it is impossible to render a judgment which may not be re-opened.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

GEORGE HAIGHT *vs.* DAVID K. HOYT.

Where a verdict is for excessive damages, and it clearly appears that the jury must have been governed by prejudice or partiality or by a grossly mistaken view of the case, it is the duty of the court to grant a new trial.

Where in an action for slander in the defendant's stating that the plaintiff burned his barns, the jury returned a verdict for \$6,733.87, and on being

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sent out by the judge for a reconsideration of the damages, returned another verdict for \$4,000, and it appeared that the declarations were made by the defendant in the honest belief that they were true, that the fire was incendiary, and that the plaintiff had borne and expressed malice against the defendant, and that no one else upon full investigation was suspected, and that the plaintiff had sustained little injury from the declarations; it was held that a new trial should be granted on the ground of excessive damages.

The practice of jurors marking severally a sum for the damages in a case, and dividing the aggregate amount by twelve, and taking the result for the amount of the damages in their verdict, is a reprehensible one.

CIVIL ACTION for slander; brought to the Superior Court, and tried to the jury upon a general denial and a justification, before *Beardsley, J.* Verdict for the plaintiff for \$4,000 damages, and appeal by the defendant on the ground of excessive damages. The case is fully stated in the opinion.

W. F. Taylor and H. S. Sanford, for the appellant.

J. H. Olmstead and L. D. Brewster, for the appellee.

PARK, C. J. The only question of importance in this case is, whether a new trial should be granted on the ground that the damages assessed by the jury are, in legal contemplation, excessive? The jury at first returned a verdict for the sum of \$6,733.87, which the court refused to accept, and returned the jury to a further consideration of the case on the question of damages, telling them that in the opinion of the court their verdict was too large.

They afterwards returned a verdict for the sum of \$4,000, which was accepted by the court, and the verdict recorded.

The first verdict clearly shows that the jury arrived at the amount of the damages by first agreeing among themselves to abide by the result which should be obtained by dividing the total amount of the damages that the several jurors should privately mark upon paper, by the number twelve. This was done, and an amount was obtained, which could not have expressed the honest judgment of any juror on the panel, for no juror would have consented to a

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verdict in a case like this, that had in its amount thirty-three dollars and thirty-seven cents, unless forced by some consideration outside of the case itself. This mode of arriving at a verdict is reprehensible, to say the least, for it is hardly possible that an honest result could thus be obtained. Some jurors would mark a much larger sum than their candid judgment would dictate in order to make up the expected deficiency of others, and so the honest jurors would be deceived and a dishonest verdict obtained. And it is apparent that many of the jurors must have marked the damages at quite or nearly the sum of \$10,000, the amount claimed in the *ad damnum* clause of the plaintiff's complaint, for the mean amount would not otherwise have been obtained. Such jurors must have been governed by some grossly mistaken view of the case, or by prejudice or partiality, and although the court returned them to another consideration of the matter, still it must be presumed they carried with them into such consideration the same prejudice or partiality or mistaken view of the case which they had previously entertained; for the court said nothing to influence them further than that "their verdict was too large in the opinion of the court." Prejudice or partiality when once formed is exceedingly difficult to be removed. It controls its possessor, and causes him to take and advocate the most extravagant views of a case; and wherever this baneful influence clearly exists, and causes gross injustice in the assessment of damages, the court should not hesitate to give redress by setting aside the verdict. In the case of *Woodruff v. Richardson*, 20 Conn., 238, this court said that "if the disproportion between the injury and the damages be so great as to indicate passion, prejudice or corruption of the jury; if by mistake or otherwise the jury have been misled by irrelevant matter, or have disregarded or misapprehended some rule of law, and thus have made an extravagant assessment of damages; in such cases, as well as others which may well be conceived, it would be the duty of the court to put its hand upon the injustice." Many other cases might be cited where the

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same rule has been laid down, but it is unnecessary to refer to them, for the books are full of them.

It clearly appears in the case that the verdict of the jury was largely made up of exemplary damages. The real damage which the plaintiff sustained in consequence of the words spoken by the defendant must have been small. They were uttered to the friends and neighbors of the plaintiff, who knew well his character, and who likewise knew the suspicious circumstances on which the defendant founded his belief that the plaintiff had burned his barns. If those circumstances were insufficient to create such belief, those friends and neighbors knew it, and would give no credence to the defendant's declarations. Indeed, the plaintiff himself said that they had caused him no damage —that he had more friends than he had before the charges were made. This was said when told that he could recover damages of the defendant if he did not burn the barns. Such is the plaintiff's own estimate of the actual damage he had sustained, and it obviously appears that his estimate was correct.

Is the case one for exemplary damages? If it is, it must be conceded that the damages are excessively large in view of all the facts presented by the record. Malice is a principal ingredient in the action of slander, and damages to a great extent depend upon its existence in fact. The difference is great between a case where slander *per se* is fabricated, and its utterance persisted in for the malicious purpose of injuring another, and a case where the words are spoken under circumstances sufficient to create the belief that all that is said is true. The defendant in one case would be a fit subject for the infliction of exemplary damages, while in the other he should be required to make compensation for, and only for, the injury, mental and otherwise, the plaintiff may have sustained. The jury clearly disregarded these distinctions and considerations in the case at bar. They made no distinction between slander fabricated and uttered maliciously, and slander prompted by an honest belief that what was said was true. Herein lies the

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wrong of this case. We think the facts and circumstances stated in the case were sufficient to create in the mind of the defendant a belief that the plaintiff had burned his barns, and to show that the declarations he made to that effect were prompted by such belief. We do not propose minutely to examine the evidence, and shall specify only some of its principal points.

It clearly appears that the fire which destroyed the defendant's barns was set by an incendiary, and the gratification of malice must have been the motive. The evidence indicates such malice on the part of the plaintiff. It appears that he was not on speaking terms with the defendant. He sought to deprive him of what customers he had, and to prevent him from getting new ones. He expressed joy on one occasion that the defendant's hay had got wet, and wished that the quantity was much greater. He said to several persons that if he knew who set the fire to the defendant's barns he would not tell. The plaintiff's wife congratulated him the morning after the fire that he was at home the night before. She knew the feelings he entertained, and feared he would be suspected in consequence. These are some of the principal facts tending to prove the enmity of the plaintiff towards the defendant, and they indicate deep-seated malice—a desire for revenge—a disposition to injure the defendant in his person and property. It does not appear that any other person in all that region entertained a similar hostility to the defendant. The burning of the barns created great excitement in the community and in the church. Detectives were employed and several investigations were had, but still suspicion fell upon no one but the plaintiff. But this is not all. The plaintiff intimated to several persons before the fire, that the defendant's business might not prosper—might not continue three months—that his barns might be burned. These intimations were very significant, and it further appears by the evidence that on a certain occasion immediately after the fire one Seymour said to the plaintiff in a pleasant manner, "What did you burn those barns for?" The witness then

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states that "he straightened up and his face was as red as a man's could be; that he could not speak a word, but stammered as though he wanted to say something, but could not say anything."

These are some of the principal facts stated in the evidence tending to show that, when the defendant made the declarations charged, he honestly believed that the plaintiff burned his barns, and that consequently the declarations were not made in malice. We think, therefore, that the jury did not comprehend the true rule that should govern them in the assessment of the damages, and that consequently there should be a new trial.

In this opinion the other judges concurred.

**BARNABAS ALLEN AND ANOTHER vs. SAMUEL H. RUNDLE
AND OTHERS.**

Where the collectibility of a note is guaranteed it is necessary for the holder to use due diligence for its collection from the maker when it falls due. But if sufficient personal property of the maker can not be found, he is not bound to attach real estate.

ASSUMPSIT on the guarantee of the collectibility of a note; brought to the Superior Court; being the same case that was before this court at a former term. See page 9, *ante*, where the facts of the case are fully stated. Tried to the jury on a general denial before *Stoddard, J.* Verdict for the defendants, and appeal by the plaintiffs on the ground of error in the charge. The case is fully stated in the opinion.

H. S. Sanford and E. W. Seymour, for the appellants.

L. D. Brewster and S. Tweedy, for the appellees.

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CARPENTER, J. This action is brought on a guaranty of a note signed by Charles Benedict, as follows:—"For value received, we jointly and severally guarantee the within note good and collectible until paid." It was admitted on the trial that the holders of the note instituted no suit against the maker before suing the guarantors. The plaintiffs claimed that they were not required to institute such a suit for the reason that the maker was insolvent. It was admitted that there was not personal property subject to attachment sufficient to secure the note. It was also admitted that there was real estate, to the amount of about \$25,000, which might have been attached. The maker had conveyed it to his wife and it was claimed that the conveyance was fraudulent, but that is not now important. The plaintiffs claimed that they were not bound to attach real estate, and, as there was not sufficient personal property to pay the demand, that they were not required to sue out a writ of attachment. The defendants claimed that it was the plaintiffs' duty before bringing this suit to pray out a writ of attachment against the maker and deliver it to an officer for service, and that, having failed to do so, they could not recover. They also claimed that only absolute insolvency on the part of Benedict would excuse the plaintiffs for not suing him before suing the guarantors; that it must be an utter insolvency, that is, an inability to pay his debts from any of his property real or personal.

The parties asked the court to charge the jury according to their respective claims. The court refused to charge as requested by the plaintiffs, and did charge as requested by the defendants. The plaintiffs appealed. The important question in the case is, whether the court in its charge to the jury gave them the law correctly.

The parties agree that the plaintiffs were bound to use due diligence to collect the note of the maker, unless such diligence was waived. There was a question of waiver, but that is not now material. The real question is, to state it in another form, what was due diligence under the circumstances?

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Prior to the abolition of imprisonment for debt the law was well settled that if the maker had property, real or personal, the holder was bound to sue out a writ of attachment, to attach personal property if sufficient could be found to secure the demand, and, if not, to attach the body; but he was not required to attach real estate. If the maker had no property at all, the holder was not required to sue out a writ. The object of attaching the body was to coerce payment. The theory of the law was, that if the maker had property he would pay the debt rather than suffer imprisonment. If he had no property he could not pay the debt, and, if imprisoned, could be discharged on taking the poor debtor's oath, and therefore the attachment of the body would be futile.

Now the defendants claim that the exemption of the body does not change the rule requiring that the maker should be destitute of property in order to excuse the praying out of a writ, that the holder is still bound to procure a writ, place it in the hands of an officer for service, and perhaps serve it by attaching real estate or otherwise; that to that extent the law gives him the means of coercion, and he is bound to resort to it.

On the other hand the plaintiffs claim that the only object in attaching the body, when the maker had real but no personal property, was to compel him to raise money and pay the debt; that it was not necessary to serve the writ if neither personal property nor the body could be found; that the statute abolishing imprisonment for debt does not require service in any case which was not required before, and that it necessarily excuses the praying out of a writ to attach the body, and dispenses with a writ in all cases except where sufficient personal property can be found.

We have come to the conclusion that the plaintiffs' claim ought to be sustained.

The law never requires a futile act or an idle ceremony. When it is obvious that legal process will be of no avail legal process is not required. That is the principle which lies at the foundation of the rule, that where there is no

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property process is dispensed with, for presumptively it will be useless. Inasmuch as the body cannot now be attached, if the maker has not sufficient personal property, the presumption is that legal process will not avail to collect the note in money; for the holder is entitled to that and is not bound to take land or anything else.

But the defendants say that the existence of process in the hands of an officer, when the maker has any property which is liable to be attached, is a species of coercion, and may result in the payment of the money. If the maker is disposed to pay the money, and is able, he will pay it on demand, and will not require a writ to be issued. If he is not disposed to pay it, or is not able, it is apprehended that the moral force of the existence of a writ in the hands of an officer will be very slight, hardly sufficient to justify us in founding a rule of law upon it, especially a rule requiring delay and expense.

It may be said that a writ in the hands of an officer is a threat to attach real estate and make expense for the maker. That may be so to some extent, but the law does not require him to attach real estate and consequently does not require him to threaten to attach it. Any pretense that the holder is about to attach it, unless it is really intended, would be a false one. The law may tolerate feints of that description, but it does not encourage them—much less require them.

It may be claimed that the coercion may be effective if the estate is actually attached, and therefore it is required. That mode of coercion existed under the old law when the body was liable to be attached, and yet it was not required. If it is required now, then the change in the statute changed to that extent the rule of due diligence—a change that was not the natural and logical consequence of the act, and therefore cannot be presumed to have been intended by the legislature. It can hardly be said that the holder is bound to attach real estate but is not bound to pursue the attachment. Such a rule of law would be illogical and anomalous. If the holder attached the body under the old law he was

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bound to levy his execution thereon. If he failed to do so, or voluntarily released the body, the guarantor was discharged. If he attaches sufficient personal property and releases it, the guarantor is discharged. Following the analogy, if he is bound to attach real estate at all he is bound to pursue the attachment; for he cannot know until the last moment that the debtor will not relent and pay the debt. At what point in the proceedings, short of an absolute completion of the levy, is he at liberty to desist? If the levy is actually completed his debt is satisfied and his claim on the guarantor is gone.

It was suggested on the argument that the recent statute authorizing a judgment creditor to file a judgment lien on real estate, thereby acquiring a statutory mortgage, might be regarded as changing the rule of law so as to require the real estate to be attached. But that is not a collection of the debt. It may secure it, but the creditor may be ultimately obliged to take the land. The defendants' contract was, not that the debt could be secured on real estate, but that it could be collected in money.

A new trial is ordered.

In this opinion the other judges concurred.

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WILLIAM H. I. HOWE AND OTHERS *vs.* THE TOWN OF RIDGEFIELD AND OTHERS.

Where a highway prayed for would if laid out make it necessary that an existing highway with which it would connect should be put into better condition in consequence of the new travel that would be brought upon it, which expenditure would otherwise be unnecessary, the committee are to consider this expense in determining whether to lay out the highway prayed for.

The question as to the condition in which a highway ought to be kept, depends in a great degree upon the amount of travel upon it.

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SUIT for the laying out of a highway; brought to the Superior Court. The committee reported in favor of laying out the way; the defendant town and sundry land-owners remonstrated against the acceptance of the report; the court (*Sanford, J.*) overruled the remonstrances, accepted the report, and passed a decree laying out the way. Appeal by the defendants. The case is fully stated in the opinion.

L. D. Brewster and H. W. Taylor, with whom were *W. F. Taylor* and *H. B. Scott*, for the appellants.

A. H. Averill, for the appellees.

PARK, C. J. Many questions are raised by the remonstrances of the different defendants in this case, but we shall consider only one of them, which grows out of that of the defendant town. Its remonstrance makes the following allegations:—

“The highway which the committee were asked to lay out was about ninety rods in length and extended from the spot marked *A* upon the map, northeasterly to the spot marked *B*; the point marked *A* is situated in the main highway from North Salem, a village with a population of three hundred, to Danbury, about nine miles distant. *B* is situated in an unfrequented lane running from the highway last mentioned to another highway which strikes the first mentioned one at a point about two miles nearer Danbury than the point *A*. The last mentioned highway and lane are narrow and grass-grown, and have never been kept and worked by the town of Ridgefield as first class roads, and the travel upon them is very slight. It was not claimed upon the hearing before the committee that public convenience and necessity required the proposed road except for the accommodation of the travel from North Salem to Danbury; and the only way in which it was claimed that public convenience would be promoted by the lay-out was, that if the lane and connecting highway were put and kept in first class traveling condition and the proposed road was laid out as it was claimed,

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a portion of the travelers from North Salem to Danbury would take that route in preference to the one now used; and there was no claim made that any considerable portion of these travelers would take that route unless the lane and connecting highway were put in first class condition. The respondents claimed, and offered evidence to prove, that in order to put the lane and highway in such condition it would be necessary for the town to expend a large sum of money in widening and repairing them, which need not otherwise be expended for that purpose; that it was not necessary to work the lane and highway as first class roads at present; that if the proposed road was laid out and used by travelers it would still be necessary to keep the former highway in first class condition, in order to accommodate travel from portions of Ridgefield to Danbury, and that it would be very expensive to keep both highways in first class condition. It was claimed by the petitioners that the lane and connecting highway being public highways, it was the duty of the town to keep them in first class condition irrespective of the amount of travel passing over them, and whether the proposed road was laid out or not; and that in determining the question of the propriety of the lay-out, the committee ought not to consider at all the expense of widening and repairing and keeping in repair the lane and connecting highway. And the committee so held as matter of law, and ruled adversely to the claims of the respondents, and refused to consider the expense of widening and repairing the lane and highway."

The plaintiffs demurred specially to this remonstrance, and the court sustained the demurrer, and adjudged it insufficient. In this we think the court erred.

It was said by this court in the case of *Perkins v. Town of Andover*, 31 Conn., 603, that "the expense incident to the establishment of a new highway is always an element which enters into the question of its convenience and necessity. To justify the committee in laying out a new highway, no doubt they should be satisfied that it is of common convenience and necessity when considered in reference to

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the expense of building it." In *Hoadley v. Town of Waterbury*, 34 Conn., 38, it is said that "on a trial to determine the question whether a proposed highway would be of common convenience and necessity, the expense of constructing the road, and of keeping it in good and sufficient repair, undoubtedly are proper subjects of consideration." The following cases are to the same effect. *Townsend v. Hoyle*, 20 Conn., 1; *Bristol v. Town of Branford*, 42 id., 321.

It appears by the remonstrance that the committee were of the opinion, and so decided as a matter of law, that in determining the question whether the way prayed for would be of common convenience and necessity they had no right to consider the expense of widening, and putting the connecting lane and highway, described in the remonstrance, in such a state of repair as the new highway would clearly require in order to make it convenient. It was apparent that such repairs would have to be made if the road prayed for was laid out, and they decided the case precisely as they would have done if such repairs had already been made. If at the time of the hearing the connecting lane and highway were simply not in such a state of repair as their location and the amount of public travel thereon required, so that a proper state of repair would render it unnecessary that additional repairs should be made in consequence of the laying out of the new highway, then the decision of the committee would be sound. But if the new highway, if laid out, by reason of the increase of public travel which it would bring to the connecting lane and highway would require that additional expenditures should be made upon them to put them in proper condition for the increased travel, then such additional expenses should be considered by the committee in determining the question whether the highway prayed for would be of common convenience and necessity. These expenses were as much to be considered as those of constructing the new highway itself; for it is manifest that these additional expenses would be the inevitable result of the laying out of the highway. The error of the committee and of the court below consisted in not making the proper

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discrimination. Whether a highway is or is not in a proper condition and sufficient state of repair, depends upon a variety of circumstances—such as its location, the amount of public travel on it, the ability of the town to bear the expense, and perhaps other considerations. In the case of *Congdon v. City of Norwich*, 37 Conn., 414, the court said that “a better and safer condition of roads may reasonably be expected and required in the summer than in spring and winter, and in populous cities than in unfrequented districts.” The proper condition of a road has ever been regarded as depending to a great degree upon the amount of public travel over it. A thoroughfare in the vicinity of a city, where there are thousands of carriages and teams of every description passing and repassing daily, should be in far better condition than a mountain road, in a sparsely inhabited region, where only an occasional traveler can be seen. Such a traveler can afford to be inconvenienced once in a long time to enable the town to keep in better condition other roads over which he has occasion to pass many times a day. It would bankrupt any town to keep all its roads in the same condition that would be required in cities. Hence discrimination must be made in making expenditures, so that the public generally can receive the greatest possible benefit from them. If one dollar's expenditure would benefit fifty persons in one case, and but one in another, and each in an equal degree, reason and justice would require that the fifty should receive the benefit instead of the one. Now it is stated in the remonstrance that the laying out of the highway prayed for in this case would require the expenditure of a large sum of money to put the connecting lane and highway in such condition as the amount of public travel over them would require; which would otherwise be unnecessary. We think it is therefore clear that such expenses should have been considered by the committee as well as the expenses of constructing the new highway itself.

For these reasons we think there is error in the judg-

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ment appealed from, and it is therefore reversed, and a new trial ordered.

In this opinion the other judges concurred.

GEORGE HOPSON AND ANOTHER *vs.* THE *AETNA AXLE AND SPRING COMPANY.*

The defendant, a manufacturing corporation, made its note for \$40,000, payable to its own order, and the plaintiffs, with three others, all directors of the company, guaranteed its payment; the company making a mortgage to the guarantors of nearly all its property as security for their liability. The object was to raise money to pay the floating indebtedness of the company and enable it to go on with its business. Held that the directors had power to borrow money for this purpose and to give necessary security; and that the mortgage was therefore valid, although it conveyed all or nearly all the property of the company.

And that it did not alter the case that the directors themselves were the guarantors for whose security the mortgage was taken.

The company, having received the money borrowed and used it in paying its debts, would seem not to be in a position to claim that the mortgage was invalid.

A savings bank, which was the holder of the guaranteed note, requiring payment of the guarantors, they paid \$20,000 in cash and gave a note for the balance, leaving the original \$40,000 note as collateral security for the new note. Held that the question whether the transaction was a payment of the original note or a purchase of it, was one of fact, and therefore not properly a question for this court; but that, upon a reasonable interpretation of the finding, it was to be regarded as a payment by the guarantors as such.

And held that, if the guarantors paid the note as such, they were not to be regarded as having paid when they were discharged from their liability by reason of the holder not having used due diligence to collect the note of the maker. The company, being itself the maker, could not make this objection. The rule being one for the protection of the guarantors, they could waive the benefit of it.

The note being payable to the company's own order, and endorsed in blank by the company for the purpose of raising money upon it, the guarantee was to be regarded as intended for any holder of the note, and, at least in equity, followed the note into the hands of every holder.

The delivery of an endorsed note as collateral security does not divest the party delivering it of his equitable interest in the note, and he may properly bring a suit for the foreclosure of a mortgage given to secure it. A

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court of equity would not dismiss such a suit, but would require the party holding the note to be brought in as a party before passing a decree. And where, during the pendency of a suit so brought, the note was returned to the plaintiff, there was no longer any reason for making the former holder of it a party.

PETITION for the foreclosure of a mortgage; brought to the Superior Court. Facts found by a committee and decree passed (*Stoddard, J.*) Appeal by the defendants. The case is sufficiently stated in the opinion.

R. E. DeForest and *V. R. C. Giddings*, for the appellants.

A. S. Treat and *H. S. Sanford*, for the appellees.

CARPENTER, J. This is a petition to foreclose a mortgage given by the respondents to the petitioners and J. M. Bullock, Samuel Wilmot and Henry Buckingham, dated October 30th, 1872. The condition, so far as it is material, is as follows:—"Whereas J. M. Bullock, Samuel Wilmot, Henry Buckingham, George Hopson and George B. Waller have this day jointly endorsed a certain promissory note, bearing even date herewith, made and signed by the grantor in this deed, in and by which the said grantor promised to pay to its own order on demand the sum of forty thousand dollars, with interest at the rate of seven per cent. payable semi-annually in advance, to be used by said grantor in obtaining a loan of money of the amount specified in said note; * * and whereas the said grantor did, when said several endorsements were made, promise the said joint endorsers of said note of forty thousand dollars, and the said several endorsers of said several notes by them endorsed, to indemnify and save them harmless against all loss and damage which should arise from said endorsements, and pay each and all of said notes to the several holders thereof, and all notes which may be made in renewal thereof:—Now therefore, if the said grantor shall well and truly indemnify and save harmless each and all of said endorsers against all loss and damage which shall arise from said

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endorsements, and pay each and all of said notes to the several holders thereof, and all notes which may be made in renewal thereof, when requested by the holders thereof, or by any of said endorsers, then said deed shall be void."

The note was discounted for the benefit of the respondents by the City National Bank of Bridgeport. It was afterwards transferred to the City Savings Bank. The savings bank demanded payment of Hopson, Waller and Wilmot, who were then directors of the respondent corporation; Hopson being also its president. Hopson, Waller, Wilmot, and one Clark, paid the note. Afterwards Clark and Wilmot assigned all their interest in the note to Hopson and Waller, the petitioners. This was in January, 1876. Early in March following the respondents paid on the note upwards of twenty-six thousand dollars, leaving due thereon upwards of thirteen thousand dollars.

The payment to the savings bank was made as follows:— Cash \$20,000, and a note payable to the savings bank signed by Hopson, Waller, Wilmot and Clark, for \$20,700—the \$700 being for interest. After the note for \$40,000 was paid Hopson and Waller erased the names of Bullock, Wilmot, Hopson and Waller as guarantors. In April Hopson and Waller gave to the savings bank the note for \$40,000 as collateral security for the note for \$20,700, and that was the condition of things when this petition was brought.

Upon these facts the Superior Court expressed the opinion that a decree of foreclosure should not be granted so long as the note in question was held as collateral security in the hands of parties not parties to this proceeding. Subsequently, upon evidence offered by the petitioners and objected to by the respondents, the court found that the City Savings Bank had no title to or interest in the note and that it had been returned to the petitioners. Thereupon a decree of foreclosure was granted and the respondents appealed.

We will first consider the claim that the mortgage is invalid for the reason that it was not authorized by a vote

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of the stockholders, and that it was a conveyance of all or nearly all the property of the corporation, and subversive of its object and purposes, and therefore contrary to public policy. We readily concede that a sale of all the property of a corporation which practically winds up its affairs must be authorized by the stockholders. The statute provides for dissolving a corporation, and when that is the object the statutory mode should be resorted to. But this transaction was of a different character. The design was not to stop business, but to continue it—not to sell the property but to raise money to pay debts. Now, if we concede to the directors the power to borrow money for legitimate purposes, and we suppose that that must be conceded, then it follows that they have power to give security. This transaction was borrowing money on a mortgage security. The money borrowed was used to pay the floating debts of the company to enable it to pursue its ordinary business with less embarrassment. And it does not alter the case that the directors who are the mortgagees were liable as endorsers. It still remains true that the company had the money. Having received and used the money raised upon the credit of the security, we hardly think the company is in a condition to claim that the security is void as being unauthorized.

Another claim is, that the petitioners did not pay the note as guarantors but as purchasers; and that the breach of the condition as alleged in the petition is the failure of the company to indemnify the petitioners as guarantors. This objection is technical and does not involve the real merits of the case. The report of the committee is ambiguous on this point. An inference may be drawn from the circumstances, and especially from the fact that the note was kept alive as a continuing obligation, that they purchased the note; but that is an inference of fact and not of law. It is not for this court to draw inferences of fact, and we are not inclined to do so for the purpose of reversing a judgment evidently just.

Notwithstanding some apparent inconsistencies we think

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the judgment may be sustained by interpreting the report as finding in effect that the note was paid by the petitioners as guarantors. The expression in the report is that they "paid said note to said Savings Bank and took up the same." Again, in the supplemental report, that "said note was paid to said City Savings Bank by said Waller, &c., in the following manner." The word "pay" indicates the discharge of an obligation rather than an investment of money.

When we consider the situation of the parties at the time we cannot doubt that they paid the note to the bank, because of their names being on it as guarantors, and that they intended to discharge an obligation and did not intend a mere purchase of the note.

They next object that the guarantors were not liable as such for the reason that the holder of the note made no effort to collect it when due of the makers. We do not think that the makers can make this objection. Their duty to pay the note was absolute, not contingent. The liability of a guarantor is ordinarily contingent upon the use of due diligence by the holder, and in a suit against the guarantor he may set up the want of such diligence as a defense. He is aggrieved by the omission. But the maker is not aggrieved. His liability does not depend upon due diligence. It is not for him to complain that he has not been sued and his property attached. Due diligence being required for the benefit of the guarantors, they had a right to waive it. They had a right to become the holders of the note by purchase independently of the guaranteee, and the liability of the makers is essentially the same whether the guarantors purchased it or paid it as guarantors.

It is next claimed that the guaranteee was not negotiable, and that the savings bank as holder of the note had no claim on the guarantors. It may be that the guaranteee was not negotiable in the sense that the holder of the note, who is not the payee, may maintain a suit thereon in his own name; but it does not follow that he may not maintain a suit in the name of the payee. The guaranteee in this case

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was clearly intended for the benefit of the holder and not of the payee. The payee is the maker, and it would be absurd to hold that it was only for the benefit of the payee and would not enure to the benefit of the holder as the parties intended it; and it would be equally absurd to hold that it was limited to the first holder. The note itself was negotiable, and the guarantee was intended as security for the note. The security, in equity at least, attached to the note, and was available to the holder whoever he might be. The question of negotiability affects only the form of the remedy and not the substance.

The respondents also insist that the court erred in admitting the evidence of the release to the petitioners by the savings bank of its interest in the note in suit; that when the petition was brought, and during the entire time of the trial, they had a good defense, and were entitled to a decree dismissing the bill.

The view we have taken of the case makes this question of little importance. If the petitioners paid the note as guarantors, as we think they did, the note was discharged, and after that was not of itself evidence of a debt; it was not an obligation, but simply a voucher. The transfer of a mere voucher did not operate as an assignment of a chose in action. But this was not an assignment of a voucher even; it was simply a pledge. Ordinarily a pledge conveys no title to the pledgee. He has a possessory right only, the title remaining in the pledgor. The pledge of a voucher, which was only evidence tending to prove the petitioners' claim, did not divest the petitioners of their interest in the claim itself. It was still competent for them to bring the petition. Even if the claim itself had been pledged, and in the form as it was of an indorsed note, we think that the petition would not have been dismissed. The petitioners still owned the claim in equity and were the parties principally interested in enforcing it. The savings bank had such an interest that a court of equity would require it to be made a party before passing a decree; but the court would not for that cause dismiss the bill. We think that the surrender of the

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pledge operated to divest the savings bank of all its interest in the subject matter, so that the court might properly render judgment without making it a party. That being so in respect to the claim, it must clearly be so in respect to a voucher which is but evidence of a claim.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

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APPENDIX.

OBITUARY NOTICE OF RICHARD D. HUBBARD.

RICHARD DUDLEY HUBBARD, the acknowledged head of the bar of the state, died at his residence in Hartford on the 28th of February, 1884, in the sixty-sixth year of his age. He was born in Berlin in this state on the 7th of September, 1818, and was early left an orphan, with means barely sufficient for his education. He graduated at Yale College in 1839, and immediately after commenced the study of law with the late William Hungerford, and was admitted to the Hartford County bar in 1842. In 1846 he was appointed State's Attorney for the county, which office he held, with the exception of two years, until 1868. During the war of the rebellion, which occurred during this period, he was an earnest supporter of the Government. In 1867 he was elected to Congress by the Democratic party, but found political life at Washington very little to his taste, and at the end of his term declined a renomination. In 1876 he was elected by the same party Governor of the state, being the first to serve under the two-years term. To the discharge of the duties of this office he brought great intelligence, an earnest desire to promote the public welfare and an absence of partisan feeling. In his first message he called the attention of the legislature in very strong language to the injustice done to women by the antiquated law governing their property rights in marriage, and under his supervision the act of 1877, making a radical change in the property relations of husband and wife, and based upon the principle of equality, was drafted and passed.

It was however in the field of the law that he won his great success. Here he became a foremost figure in the public eye. He was not only the first lawyer in the state, but its greatest orator. His superiority as a lawyer was owing less to a laborious study of books, though he was always a diligent student and very thorough in the preparation of his cases, than to his perfect comprehension of legal principles. He had obtained a complete mastery of the science of law. He would detect the slightest swerving from its harmony as a fine ear would detect the least discord in music. He had strong common sense, by which he tested everything. But with the soundest of judgments he united the greatest quickness of apprehension and brilliancy of imagination; with an apparently unlimited grasp of mind, a rare fineness of discrimination. He was however never led astray by a fondness for legal casuistry, and he had no relish and but little respect, while yet fully understanding them, for the mere technicalities of the law. His mind was eminently a philosophical one, and found recreation in the study

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of philosophical systems and abstract speculation; nothing interesting him more than the great mysteries and baffling questions of life.

As an orator he was best known to the general public. His success here was of course attributable in large measure to great natural powers; but he had improved these by a good classical education and by the superadded scholarly culture of a lifelong familiarity with the ancient and modern classics. Indeed it was this culture that gave to his oratory its special charm. With no attempt at rhetorical display, with never an impassioned delivery but a special quietness of manner, he yet had an exquisiteness of thought, a fertility of imagination, and a power and grace of expression, that made his addresses on every occasion captivating to his hearers; while his more studied efforts were worthy of any orator of any age. Some of his addresses at meetings of the bar called to pay tributes to deceased members, have been remarkable for their beauty. That upon Mr. William Hungerford, who had been beyond any other man in our state the representative of the ancient school of English lawyers, and who died in extreme old age in 1873, is one of the finest pieces of composition that the English language has ever known. Indeed, one gets a new sense of the power of that language in reading it. These addresses may be found in the appendices of the 35th, 39th and 48th volumes of the Connecticut Reports.

Mr. Hubbard's superiority was not limited to any circumscribed department. Before the court on questions of pure law, before the jury on questions of fact, in the halls of legislation, on the public platform, he was the same clear thinker, the same graceful, illuminating, persuasive speaker. In his professional practice he was the soul of honor; duplicity and trickery he could not tolerate. He was a man of truthfulness everywhere; he could not bear shams and pretences. His nature was a reverential one, but almost wholly towards objects that came before him as tangible, or at least as veritable, realities. A noble man, a truly admirable woman, a great act, filled his heart with a real reverence. But he seemed to lack the power, with all his ideality, of penetrating the veil that hangs around our narrow horizon and filling the seeming void with realities. Ever an anxious questioner of the infinite, he seemed to get no response that he was able to interpret.

Mr. Hubbard lacked ambition; he had no fondness for appearing before the public; no desire for office or honor. Even for the law, in which he won so great triumphs, he felt no great enthusiasm. He loved the quiet of his library and the company at table and fireside of cultivated and congenial friends. In all this he was somewhat too ready to seek his ease, but he rose up manfully to meet the demands of any clear public duty. He had no ear for music and had not been educated to a taste for art; but he enjoyed greatly the beauties of nature and was charmed by foreign travel. His integrity was more than

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unquestioned; it had the emphatic endorsement of the whole public. In social life he was the most charming of companions, with a sparkling wit and rare conversational powers, and a faculty of bringing to his service and to the entertainment of his friends quaint passages of humor and of wisdom from the old English writers.

In every position in life he was *facile princeps*. In his death in the full vigor of manhood the "gladsome light of jurisprudence" seems dimmed. His brilliant life has passed by, and left very few memorials of itself. He filled a large place while he lived, yet how small that which his memory will fill, when, a few years hence, those who knew and admired and loved him, have passed away? Most touchingly appropriate to his own case are these concluding words of his eulogy upon Mr. Hungerford:

"And now when I consider this long life closed, these many years ended of eminent labor in the highest ranks of the forum, and nothing left of it all but a tolling bell, a handful of earth and a passing tradition—a tradition already half past, I am reminded of the infelicity which attends the reputation of a great lawyer. To my thinking, the most vigorous brain-work of the world is done in the ranks of our profession. And then our work concerns the highest of all temporal interests, property, reputation, the peace of families, liberty, life even, the foundations of society, the jurisprudence of the world, and, as a recent event has shown, the arbitrations and peace of nations. The world accepts the work but forgets the workers. The waste hours of Lord Bacon and Sergeant Talfourd were devoted to letters, and each is better remembered for his mere literary diversion than for his whole long and laborious professional life work. The cheap caricatures of Dickens on the profession will outlive, I fear, in the popular memory, the judgments of Chief Justice Marshall, for the latter were not clownish burlesques, but only master-pieces of reason and jurisprudence. The victory gained by the counsel of the seven bishops was worth infinitely more to the people of England than all the triumphs of the Crimean war. But one Lord Cardigan led a foolishly brilliant charge against a Russian battery at Balaklava and became immortal. Who led the charge of the seven great confessors of the English church against the English crown at Westminster Hall? You must go to your books to answer. They were not on horseback. They wore gowns instead of epaulets. The truth is, we are like the little insects that in the unseen depths of the ocean lay the coral foundations of the uprising islands. In the end comes the solid land, the olive and the vine, the habitations of men, the arts and industries of life, the havens of the sea and ships riding at anchor. But the busy toilers which laid the beams of a continent in a dreary waste are entombed in their work and forgotten in their tombs."

At a meeting of the Hartford County bar, called on the occasion of Mr. Hubbard's death, and which was very largely attended, the following resolutions were reported by a committee for adoption:

"The Bar of Hartford County, called together by the death of Richard D. Hubbard, place upon record this tribute to their honored leader and loved associate:—

"Mr. Hubbard had won the first place in his profession; but while others have done this, he took a step beyond and created a place which no one but himself could fill. It was not mere professional ability that distinguished him above his fellows—it was profound ability permeated by a personality so rare that there could be no question of equality where there was no possibility of comparison. He laid the foundations of success by grappling with the toughest drudgery of the profession with a per-

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sistence that nothing could shake. Yet all this ground work was enlivened by a spirit so fresh, a humor so sparkling, an ease so natural, that the result of his severest labors seemed rather the inspiration of the moment, and we lost sight of the fact that he was really one of the hardest of workers.

"He was eloquent; but his eloquence was entirely his own. His quiver was filled with every arrow that could legitimately be used. Logic, solid and compact; rhetoric, fresh and natural; humor, sarcasm, invective, pathos—all were used, and in his own peculiar way, not for the mere sake of use, but as occasion required to accomplish some specific object, with an unerring instinct as to the fitness of time and place. And running through all his eloquence, distinguishing his illustrations, the fitting of words, the turning of phrases, and even the putting of syllogisms, was that masterful wit which consists in pleasing surprises and holds the hearer, not only by the force of what is said, but by the witchery of constant expectation.

"He looked upon the law as an arena for professional struggle, and was, in the best sense, a stalwart fighter. Indeed, a certain healthy and vigorous combativeness that squarely met every obstacle, asking no quarter, was one of his most marked characteristics and largely contributed to his success. In the trial of a cause he was like a soldier armed at every point, fighting for his client with an utter fearlessness and an energy untiring to the end. But his combats had no tinge of bitterness. They never left a sting, and were marked by a generosity that received with hearty admiration well-directed blows fairly given.

"In council, the rare suggestiveness of his mind was conspicuous, and in argument of questions of law he exhibited the highest qualities of the jurist. A broad and yet clear conception of legal principles, the power of keen analysis, often subtle, but rarely unsound, a nice discrimination in the application of law to facts, made his arguments a valuable and lasting contribution to the jurisprudence of the state.

"He never forgot the lawyer in the advocate. In the performance of every professional duty he exercised his office with fidelity as well to the court as to his client.

"As a public man, Mr. Hubbard illustrated anew the truth that the most unselish patriotism and purest execution of public trust is found in those drawn from the ranks of our profession. He carried into public life the same industry, eloquence, fearless advocacy, broad and vigorous thoughtfulness and sterling integrity, that marked him as a lawyer. But his life was mainly given to his profession. He held office long enough to accomplish some lasting good and to prove how much the state has lost.

"The records of the courts will bear witness to Mr. Hubbard's rare professional ability, the records of the state will testify to his public service; but the virtues of the man, just, generous, loving, true—binding to him through a long life by unbroken links of firmest friendship all who have really known him—these can have no permanent record; they live only in the hearts and lives of his friends."

Mr. Henry C. Robinson remarked upon the resolutions as follows:—

Mr. Chairman and Brothers: We are all in harmony to-day. It is the harmony of minor chords. This chamber of yesterday's contests is a chamber of mourning; in this temple of justice there is no fire burning but upon the altar of affection. There is no eye here which is undimmed, no voice which is unfaltering, no heart which is untouched. And I look along the lines of our circle to find one who is brave enough to tell our story of sorrow. But the lips which we should all love to wait upon to voice our grief shall open no more in eulogy. Oh, for an half hour of the living Hubbard to sketch the features of our Hubbard who sleeps. It seems as if we were standing by that great prostrate trunk in the Mariposa grove which began to build its young growth

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into its magnificent architecture and to toss its green braids in those crystal airs before the birth of Plato or Demosthenes. But now it lies upon the ground, its roots torn, its branches shattered and gone, its massive column stretching away in long distance and rising up in its circumference like a fortress. It is all that is left of that once supreme specimen of nature in vegetable life. They call it the "Fallen Monarch."

I shall attempt no exhaustive analysis of our friend's professional powers. There is no office in a lawyer's high calling which he did not adorn. His presence was the presence of a master, in the struggles of reflection, the flashes of insight, the responsibilities of counsel, the preparation of causes, the perils of examinations and the triumphs of advocacy. There is no weapon of honorable warfare which he did not wield; there is no method of skilful defence which he did not use. No conflict of authorities confused him, for he poured them all into the crucible of his fervent analysis, and burned away their dross. No problem of induction appalled him, nor any network of sophistry, though knit with the skill of Vulcan, bound him. He feared no antagonist however great; he despised no associate however humble. He brought to his practice great learning, but he was linked to no past which must not yield to a better present. He honored a technicality which covered a principle or was tied to a policy, but for a technicality which had only the credentials of scrupulosity and of weed-tithing, he had only contempt. The wisdom of the old judges he held in high respect, for their wigs and gowns he had only a smile.

To his profession he was ardently attached. He loved its science, its eloquence, its wit, its nobility. He was proud of its history, of its contributions to philosophy and literature, of its manifold struggles in defence of human rights, and assaults upon human wrongs. But he had no idolatries. He loved his profession with the zeal of enthusiasm and the loyalty of chivalry, but he was bound in chains to no philosophies, or traditions, or callings. He had no theory in things political that man was made for a party or a profession; nor in things social that man was made for etiquette or wardrobe or manners; nor in things religious, that man was made for churches or sacraments. He believed that churches and states, parties and professions, titles, traditions, symbols and treaties, chancels and vestments, Sabbaths and scriptures, were all made for man. And so while he was the ablest and most accomplished lawyer of our state, he was more than that; as manhood is greater than business, and life than a profession.

The great questions of life which take hold of human rights and human character; of truth, justice, love, self-denial, courage, freedom, benevolence, modesty and honesty, education and culture, are all too broad to be delivered to the trusteeship of any single profession or philosophy, to any one church or nation. They are open to the enduring power of literature and to the evanescent influence of oratory, to

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the shadows of art and the substances of experience. From these great things so great a man as our friend could not withhold the activities of his great nature. To them he brought that strength which characterized his efforts, and which was written legibly upon his features and form. To them he brought that aggressiveness which made him so often a victor, and always so brave. To them he brought that honesty which scorned tricks and hated lies, and that conscience which sought truth, and for it slew many a prepossession. He illustrated that rare combination in intellectual nature, of consummate powers of reasoning joined with those flights of creative imagination, bubblings of wit and thrills of pathos which are significant of insight and intuition. His processes were skeptical rather than positive. He was never oversanguine, and was often too apprehensive. His words and sentences blazed like a sun. At times, disregarding the strictest rules of the rhetoricians, his grand thoughts found expression in pungent and incisive phrase, which sparkled with originality and freshness. He had no room for common-place things in idea or form. His arguments, addresses and eulogies are of the finest forensic efforts of our nation, and his state papers are among the best contributions to our political literature. Mr. Hubbard's culture was peculiarly his own. He sought and studied the great arguments and orations of the past and present. He was a profound student of Shakespeare and Milton; he delighted in John Bunyan, Thomas Browne, Thomas Fuller and Jeremy Taylor. He was cultivated in the French language and enjoyed the suggestive methods of French wit, and was familiar with their great dramatists and public orators. For fiction and pure metaphysics he cared little. The terms of Hegel seemed to him a tangled humbug. He was no lover of art. He was wont to ridicule men who raved over a square yard of painted canvas, but who felt no enthusiasm in a Connecticut sunset. He had no taste for music; there was a certain strength and manliness in architecture which reconciled him to it. He was exclusive in his affections, but he was broad in his sympathies. With the tumult of his whole personal force he hated despotism and oppressions, civil, social and ecclesiastical, and he held the emancipators in high honor. He waited for public office, and that in a day when political gardens blossom with claims and booms and self-pushings, and when modesty has gone out of the conventions as a lost grace. I dare not speak of what he was in the intimacies and sanctities of his personal friendship. Blessed are they who felt them; bitter is their grief as they are now but memories.

I cannot leave this shining death, this silence of tongue most eloquent, this gathering to dust of him, the foremost citizen of our state, this muffling of that heart which always beat in rhythm with justice and truth and friendship, without seeking for a gleam of hope through the clouds. Let him who will, believe that there are no invisibles; that logic, wit, imagination, friendship, courage, faith, love, are born in the

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fibres of the body, vibrate with its molecules and die with its decay. We stumble upon mystery and mystery until life seems a string of puzzling interrogation points. We fill our waste basket with puerile notions; we revise our philosophies and our creeds. But there remain as our stars in these hours of midnight, as everlasting verities, the reality of the invisibles, the universality of the divine goodness, the immortality of human love and human character, all ensphered and uplifted in that one holy life in Judea which defies definition, but which it is our sweet privilege to follow.

Mr. Alvin P. Hyde, who had been for several years one of his law-partners, addressed the bar as follows:—

Mr. Chairman and Brethren: None of you can be more aware than myself of my utter unfitness to speak on an occasion like this, and were it not that my peculiar relations to Gov. Hubbard seem to render it fit that I should say a few words, I should obey my inclination to mourn in silence. My intimate acquaintance with Gov. Hubbard commenced in 1858, when we were associated as members of the legislature. The friendship thus formed was never broken or interrupted during his life. In 1867 I became his partner, and ever since, for a period of more than sixteen years, we have occupied the same or adjoining rooms and have been in almost daily communication. During all these years there has never been a jar or disagreement between him and myself or any member of our firm, a fact of which he spoke to me a short time since, as a matter of which we might well be proud. The admiration, respect and esteem I entertained for Gov. Hubbard as a lawyer, an advocate, a citizen and a man, before I became his partner, have since ripened into a feeling of affection and love for him which overshadows all other ties. No man could live in daily intercourse with him, as I have done, without learning that the fundamental principles on which all his actions were based and governed, whether professional, personal or as a citizen, were—what do the strictest rules of honor, right and justice require? Nothing was ever allowed to interfere with that idea. His self-interest, the apparent interest of the firm, nay, even partisan interests, so far as he could control them, must yield to this inexorable rule.

His loss to me is something more than his loss to most of the members of the bar. My attachment to and affection for him could not have been stronger had he been my own brother—though had he been my brother I should have felt an infinite pride in the thought that I belonged to a family which could produce such a specimen of a man. I leave it for others to speak of his character as a lawyer, simply remarking, what no one here will gainsay, that our chief has fallen and we have no equal to take his place.

As a counselor, when called upon to advise a client as to the launching or defending a suit, he was cautious almost to the verge of timidity, indefatigable and minute in investigating the principles bearing upon

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both sides of the question in issue. But when the issues were made up, he cast aside his doubts and entered the contest with his armor on, equipped at every point, and fought manfully, a stand-up fight, despising all subterfuges or evasions. If he sometimes failed, as all must, it was from no fault or neglect of his.

As an advocate he possessed remarkable power. His addresses whether at the bar or elsewhere sparkled with gems of wit and illustration. He had a wonderful faculty of presenting a case involving the driest questions of law or fact in such attractive and illustrative language as compelled the constant attention of the hearers, without for a moment abandoning his line of argument or interjecting a single sentence by way of ornament and which did not serve as a part of his argument. I never have seen a member of our profession or any other, who exhibited in his speeches such evidence of rugged strength combined with literary excellence and scholarly finish as did Gov. Hubbard. His arguments were always solid, symmetrically and logically built from the foundation. There was no stucco or outside adornment to cover or conceal the barrenness of the walls. But every idea and thought, which formed one of the beams or planks of the frame-work of his structure, was so carved and ornamented that when put in its place its ornamentation added to the strength of the whole.

It is said that when a man dies, however prominent he may have been, it is like casting a pebble into the sea which causes a ripple that soon vanishes and all is forgotten. This may be so, but I do not believe that any member of this bar who has known and practiced with Gov. Hubbard will forget him or his character or his example while life lasts.

Mr. George G. Sill remarked as follows:

Thirty years ago it was my good fortune to be a student of Gov. Hubbard. There was formed a friendship which remained unbroken and never marred by one unkind word uttered in the sometimes fierce heat of forensic contests. He was not demonstrative in his friendships or affections, and one might only learn by a single word or tone of his voice the degree of esteem in which he was held. It was my privilege to sympathize with him in his sorrows and disappointments and to rejoice with him in his hopes, ambition and success. It is not needful to speak of his social qualities and friendships, for these are the private treasures of those whom he honored with his society and confidence. I prefer in this presence to speak of him as a lawyer and a magistrate. He came to the bar when such men as Hungerford, Toucey, Perkins and Chapman were the chiefs, intellectual gladiators, completely armed and experienced warriors. This young Ivanhoe, with vizor down, and with sword and lance, entered the lists with these Knights Templar. If the first tournaments were not joyous, if his lance was splintered, his shield pierced, and he unhorsed, he obtained the respect of his adversaries for his fairness, his equipment and his fertility of resource. If Chapman, that unrivalled man in dealing with questions of fact,

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excelled him in cross-examination and sharpness of speech, Hubbard was his superior in application and study and knowledge of legal principles. If Hungerford, that profound and never-satisfied student, who explored all the labyrinths of the law, all the broad rivers and little streams, following them over trackless wastes to their sources, was more untiringly devoted to his profession, Hubbard had more personal magnetism and persuasive oratory. And so the youthful knight was no despised competitor, and soon came to stand shoulder to shoulder with them in the contests for success and honors in the forum, and when they passed away full of years and renown, Governor Hubbard easily became the foremost man in his profession in the state.

Let us turn from his abounding successes and honors won in his chosen profession, to view his career as a politician and chief magistrate of the state. With his philosophic mind, patriotic impulses, honest purposes and economic studies, he was thoroughly fitted for the ideal governor of an ideal commonwealth. For this age and present state of political morals, he was born too early. He believed that men formed themselves into a political party from a unity of ideas and purposes, that each party had for its ultimate object the greatest good to the greatest number, while pursuing that object by widely divergent paths. He apparently forgot that all men were not like himself, and that parties are formed to secure the honors, powers and emoluments of public positions, the good of the state being a secondary consideration. With his habits of thought, love of study and quietness, and his hatred of ostentation, sham and gewgaws, he was reluctant and ill-fitted to enter the noisy and dirty arena of politics. The tramp of men, the glare of torches, the suffocating smoke, the tinkling of cymbals, the shoutings of the hustings, the applause of the people, were distasteful to him and failed to make his pulses bound or arouse his enthusiasm. Had he lived in the days of Cromwell and the English revolution he would not, like Hampden, have led his little troop of horse against Rupert's forces on the field of Chalgrove, and sacrificed a priceless life. He would have been found in his library or in a cloister, reading his breviary, or Milton and Shakespeare, or the Greek and Latin poets and historians and orators. Turmoil, confusion, blood, were not to his liking. An advanced age may admire his really wonderful qualities of mind and heart for a chief magistrate, his masterly state papers, his unsurpassed oratory and his unequalled specimens of English composition, but to-day these are appreciated by a few only. I have said he was born too early. He was born too late. With his love of philosophy, of the beauties of nature and art, and his love of discussion, he should have been born in the culminating period of Athenian patriotism and culture. I think I can see him under the soft skies of Greece walking with Socrates and Plato in the academy, the porticos, the gymnasia, the workshops and market places, and discussing the nature or origin of virtue and the immortality of the soul.

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The temples, the statues, the games, and the philosophy and poetry of Greece, would have been to him an unending pleasure. He had the fascination and versatility of Alcibiades without his follies and faults. He loved thought and repose. The latter he has at last found in the cold embrace of death. The mysteries of life and the grave are now revealed to him. His halting faith no longer darkens his existence. What he longed so much to believe and know he has realized in that unknown and mysterious future which lies beyond the confines of his mortal life.

Mr. William Hammersley spoke as follows:—

In the presence of the grief that calls us together I would far rather be silent. Standing by the open grave of one possessed of rare mental gifts and acquirements, but whose gifts of intellect, great as they were, seem but as sounding brass and the tinkling cymbal when compared with the wonderful gifts of heart and character that drew to him his friends with a love not to be expressed, speech seems utterly weak and empty; and yet I felt compelled to say a few words—not to sketch his life, or offer a tribute of praise to his memory, but simply to join with my brothers in this very inadequate way of testifying to our great loss.

The end of any useful life is a loss irreparable to the living. In our moments of gloomy philosophy we are apt to say that no one life is of much consequence, that those who come after take the places of those who go before, and the world moves on without a ripple. This is not quite true. The creative power that never duplicates a creation, even in the countless myriads of the forest leaves, gives to every human life a different character and a peculiar work. The work that is specially given us to do, if not done in our lives, will forever remain undone. While this is true, yet the resemblances among men are so great that one generation succeeds another with little apparent loss. But now and then, as if to keep us in mind of the great truth that each life, however humble, has a work to be accomplished that can be taken up and finished by no other life, we find a character so widely different from the ordinary mold, that we say at once, here is a man whose place in life, once emptied, can never be filled. Such was the character that gave the peculiar charm to the life of Mr. Hubbard, that makes his death a loss, a void. When the healing hand of time has somewhat softened the sharpness of the grief that now fills our hearts, it would be a pleasure, perhaps a duty, to place in some enduring form an analysis of the qualities that combined to make so rare a character. To-day we can only acknowledge our irreparable loss. Doubtless the thought has this morning come to all of us, of the golden tongue that has spoken for us when from time to time we have met to pay the last tribute to the memory of some brother fallen from the ranks. We recall the brilliant and life-like portrait of Chapman, the matchless eulogy of Hungerford, the eloquent portrayal of the judicial career of Seymour and of the kindly virtues of Waldo. But now—where is the

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golden tongue that can give voice to our love for Hubbard? There is no need. He being dead yet speaketh. The throbbing of the people's heart, the thronging memories of this room, this sad gathering, these unaccustomed tears, pronounce an eulogy, more just, more eloquent, more loving than human tongue can utter.

Mr. Albert H. Walker remarked as follows:—

When Robert Burns died his townsmen went about inquiring of each other, "who will be our poet now?" as though Dumfries or Scotland might hope to have another Burns. No Burns came again to the Scotch, but that people soon after gave another great poet to mankind. In like manner, Hartford and Connecticut may be given, by the coming years, as great a man as Richard D. Hubbard; but they cannot give a man having the same combination of solid traits and brilliant qualities. He was able as a lawyer. He was more than able as a statesman. As an orator he was great. As a lawyer his superiority was philosophical rather than learned. Other members of the bar may have excelled him in command of the resources of the books; but none equalled him in command of the resources of reason. While others were basing legal conclusions upon ancient precedents, he was causing them to grow naturally out of the relation of things and the circumstances of human life. As a statesman, his superiority was ideal even more than it was actually realized. His standard was too high to be adequately advanced without ambition, and Governor Hubbard was not ambitious. It was for this reason, and this reason alone, that the light which shone in Connecticut did not shine throughout all the states. As an orator his superiority was poetic rather than passionate: rhetorical in form and in figure, rather than in fire or fury. The field of his eloquence was the field of the imagination. The devotions of patriotism; the kindly qualities of the dead; the swift approaching end of the living; these inspired his prophetic brain to fashion the language of poetic prose to mould the beautiful sentiment of eulogy. In this field he was supreme. None live to lay so beautiful a wreath upon his grave as those he laid upon the graves of Hungerford, Seymour and Waldo.

Mr. Thomas McManus next spoke as follows:—

A professional residence for many years, under a common roof with our departed friend—an intimate friendship from the date of my admission to the bar—these give the right to add my voice to the many that are this day lifted up in lamentation over the prostrate form of the great leader of the Bar of Connecticut.

An ancient maxim enjoined all utterances save in praise when the dead were the subjects. It was the singular felicity of him whom we mourn, that he experienced this delicate exemption even in life. It has been permitted him to anticipate a portion of the fame that attends the memory of the good.

Striking in personal appearance, in physique powerful, in disposition

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cheerful, super-eminent in abilities and irreproachable in character, with scarcely a peer and with no superior, it is no wonder that we exulted in the fact that this rare being was one of our own professional community. An ardent patriot, yet wholly unselfish; an able statesman, a jurist unexcelled, and an orator unequalled; indignant at professional uncleanness, yet merciful even to tenderness towards human weakness when repentant. Surely this generation can not hope to look upon his like again.

He had held high honors, but they were so far below his deserts that even envy murmured at the paucity of his rewards.

(The speaker closed with the narration of an incident that fell under his personal notice strikingly illustrative of the warm sympathy and thoughtful kindness of Gov. Hubbard.)

Other addresses were made by Messrs. Franklin Chamberlin, Samuel F. Jones, Henry S. Barbour, Sherman W. Adams, Charles E. Perkins and John Hooker, after which the resolutions were unanimously adopted by a rising vote.

Eulogistic addresses were made the day before in both houses of the General Assembly, which was in session, and resolutions in honor of Gov. Hubbard were passed.

Gov. Hubbard's funeral took place on Saturday afternoon, March 1st, prayers being read at the house of Rev. Mr. Watson, rector of the Church of the Good Shepherd, at which he was an attendant. After this a public address was delivered by Rev. Dr. Parker of the South Congregational Church, a life-long friend, to an audience that filled the church to its fullest capacity, the bar of the county attending in a body, with delegates from other counties, and representatives of the city corporation and other companies and institutions with which Gov. Hubbard had been connected. The address was as follows:—

ADDRESS OF REV. DR. PARKER.

The public press has fitly voiced the feeling of tender sorrow that pervades our afflicted city; honorable members of the state legislature have recalled Mr. Hubbard's distinguished services to our commonwealth, and have testified of the high esteem in which his name and memory are held by the people of Connecticut; his brethren of the legal profession have justly and eloquently eulogized their illustrious and beloved chief, delineating his character, remarking his solid and shining intellectual endowments, reviewing his signal success in his chosen profession, and his no less brilliant success as a statesman and orator. It is, therefore, unnecessary that, on this occasion, I should speak of him in his professional or political relations. Let me simply indicate the vital relation of the man's character to the singular success which he has achieved, and to the admiration, pride and honor in which he is justly held.

Obituary Notice of Richard D. Hubbard.

"Many are the friends of the golden tongue." But it would be a great error and injustice to attribute his power and popularity to the possession of remarkable forensic and oratorical gifts alone. The "golden tongue," the genius for convincing and charming eloquence, could never, of itself alone, have secured for Mr. Hubbard the commanding position which he occupied, or won for him the universal respect, confidence and honor accorded him throughout this commonwealth. Behind the "golden tongue" was a powerful intellect, a splendid and chastened imagination, great analytic and synthetic powers, rich and varied learning, singular skill of statement, remarkable felicity of illustration, a firm grasp of both facts and principles, a resolution commensurate with his resources, the regnant calmness of a circumspect mind which suffers no straggling word to betray its lines of march or to mar with haste the dignity of its movement. He was

"No wordy babbler, wasteful of his speech,"

even when his words fell like flakes of wintry snow, but behind all this manifold and marvelous intellectual instrumentality was the manhood and its mighty powers of truth and honor and justice and gentleness. His splendid genius rested on his granitic character. The chief secrets of his success are to be found deep in the virtues of his great manliness.

First of all, Mr. Hubbard was a truth-loving, truth-seeking, truth-speaking, truth-acting, truth-exacting man. You read this in his clear, unquailing eyes, in the firm set of his head, in the strong features of his face, in his gait and gestures, in his movements and manners. You heard it in the tones of his gentle but masterful voice. You felt it in the atmosphere of his presence. Not only in matters of business and politics, but in the affairs of society, and in the personal and intimate relations of life, this splendid sincerity, this absolute truthfulness of nature, was evident. Men knew that he was incapable of falsity and could be trusted utterly.

He was a singularly honorable man. His standard of honor was a lofty one. His sense of honor was keen. He renounced the hidden things of dishonor as heartily as he denounced their external manifestations. His God was so far mediæval as to be the "Lord of Courtesy." He was in full sympathy with that early English poet who described Jesus as

"The first true gentleman that ever breathed."

He never took unfair advantage. He never dealt a foul blow. There was something knightly in his magnanimous spirit. He belonged to the nobility by birth, and accepted the obligations of that nobility,—*noblesse oblige!* His soul stood upright within him,—a soldierly sort of soul, loyal and reverent to authorities, but fearless, vigilant, inquisitive, circumspect, looking out thoughtfully and sadly into the all-encompassing night and mystery, but undismayed, nor ever swayed from duty or warped from uprightness.

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He had a passion for justice and a fine pride therein. This inspired his unremitting labor, and explains his solid and compact character. This passion for justice now prompted, now checked his speech. It determined and regulated his argument and his conduct. I think it even made him unjust to himself at times. It made his conversation and companionship refreshing. It guided him amid political excitements, it strengthened him against the temptations of partisanship. It gave to his friendship a priceless value. It explains what has been called his lack of ambition. To deal fairly and do justly seemed to him of more importance than forensic victories, oratorical successes, party triumphs, or personal popularity. As Dean Stanley said of Mr. Grote, it may be said of Mr. Hubbard: "Let those who think it consistent with their station, or their rank, or their religion, to treat with rudeness or with scorn those from whom they differ or those to whom they are superior, remember the gracious urbanity, the antique courtesy, the tender consideration with which he met the jarring circumstances and characters of life." He could prefer others in honor, he could render to every man his due, "honor to whom honor, custom to whom custom."

There was a great, warm, generous heart in Mr. Hubbard, overflowing with human kindness, for with him justice was not that literal and legal skeleton which does duty in the dissecting-rooms of scholastic philosophy, but a living and spiritual virtue in whose heart are fountains of mercy and tenderness. How kind, how gentle, how generous he was—except to himself! How catholic his sympathies! Belonging to the aristocracy of letters, yea, to the aristocracy of souls, he was as true a democrat and as little of a demagogue as Abraham Lincoln. His whole heart went out toward the innumerable children of men in their never-so-blind and unwise struggles for freedom against oppression and misrule. Thoroughly conversant with the history, institutions and literature of older nations, his confidence in the political constitution of his own country and in the capacity of the people to work out their political salvation with unprecedented success, was complete and enthusiastic. In the diligent pursuit of a profession which more than any other, perhaps, discovers the perversities of human character and conduct, he did not lose his faith in men, nor his respect for human nature, nor his confidence in human progress, but continually his heart was enlarged. And so, despite his reticence, his shyness of professions, his extreme sensitiveness to publicity, his tendency to seclusiveness and study, and the strain of something like melancholy that ran through his poetic and philosophic temperament, he came to be known as our least voluble, but most valuable citizen. There is mourning for him in the factory and in the college, in the store and in the study.

In the freedom of the society of his chosen friends what an altogether remarkable man he seemed. What originality of thought, what cogent reasoning, what splendid allusion, what wealth of illustration, what

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apt quotation from his Bible and his Shakespeare, what sallies of wit, what copious outflow of sinewy but graceful speech, what beauty of soul, what powers of subtle, versatile, brilliant mind were unconsciously displayed!

He was unfathomable and unaccountable on the spiritual side of his nature. There was something awful in the greatness of his secrets, in his will and power to carry alone burdens and sorrows and doubts. He looked out into the unseen things, as it seemed to me, with the calm, sad eyes of the Sphynx. What he saw in that direction no man knows, I think. If he was constitutionally skeptical, his spirit was reverent and devout in unusual degree. Such a man's quiet questionings are more religious than much unquestioning faith. Whatsoever things are true, whatsoever things are honorable, whatsoever things are just, whatsoever things are pure, whatsoever things are lovely and of good report—he not only thought on these things, but was rooted and grounded in them.

And if the beatitudes are true—if the poor in spirit, the merciful, the meek, the peacemakers, and they that hunger for righteousness are blessed and the kingdom of heaven is theirs, then our friend receives the Great Master's benediction. Thinking of him, recalling him, one cannot conceive of any other kingdom in the least suitable for him than that wherein dwelleth righteousness. For each true man is citizen of one true city.

Fellow-citizens, as we review the names of our illustrious dead in Connecticut, behold how numerous they are and how they make our annals shine.

“This little planet doth adorn itself
With the good spirits that have active been
That fame and honor might come after them.”

Among these bright historic names is now enrolled the name of Richard Dudley Hubbard. Among these good spirits whom fame and honor follow, lives forever his good spirit. We shall see his face no more, but we have not wholly lost him since his lofty standard and bright example remain. We shall hear no more the music of his lips, but the message of his life and character shall be pondered in our hearts with his name and his memory. No one will fill his place. No one can. But his place is already filled. His work is done. Other men will come and take their own places and do their appointed work. Let us remember that Nature never blunders. Let us believe that God makes no mistakes. The destructions over which we mourn because they remove the objects on which our affections are so fixed, are preliminary to reconstructions. The decaying tree must be supplanted, the crumbling column replaced. The mysterious voice heard all along the shores of the *Ægean* sea proclaiming that great Pan was dead, was a herald of the birth in Bethlehem.

Our heroes die and our saints depart and our hearts are full of sor-

Obituary Notice of Richard D. Hubbard.

row yet not without hope. Lying in their mothers' arms and lodged in rude mangers, it may be, are the heroes and the saints of the times to come; nor shall they be wanting to any age, nor shall God's kingdom fail to come for lack of them.

" And they made ready for Ulysses that he might sleep there without waking. Then he embarked and silently lay down, and deep sleep weighed down his eyelids—a sweet, unawakeful sleep. But when the messenger of Dawn arose, the ship touched the strand, and the sleeper awoke and stood upon his native shore."

Oh, brother sweet! what would'st thou have me say?
 Sleep well, farewell; the night is for the day
 And not the day for night!
 Sleep well, till morning light
 Shall break thy rest; then rise, and go thy way!

The verse with which the address of Rev. Dr. Parker closes, proved to be a part of a poem written by him at the time, and which has since been published. The poem is one of such exquisite tenderness and beauty that it is added as a fitting close of this memorial.

IN MEMORIAM.

R. D. H.

The lips are silent which alone could pay
 His worthy tribute. We can only lay
 The laurel on his breast,
 And bear him to his rest,
 And say, farewell, dear soul, till break of day!

Amid the fickle and faint-hearted throng
 His heart was ever steadfast, brave and strong.
 His counsel gave us light,
 His courage gave us might,
 To see the right, to wrestle with the wrong.

That sturdy, stalwart presence was a tower
 Of strength and hope, in many a trying hour:
 In friendship warm and wise,
 In large self-sacrifice,
 In countless kindnesses we proved his power.

Dear brother soul! within that realm unknown
 Where thy good spirit far from us hast flown,
 Canst thou look back and see
 How lonely, without thee,
 And how impoverished our world has grown?

In purer light dost thou now clearly scan
 The lines of truth so dim to mortal man?
 Dost see, amid our gloom,
 The beauty and the bloom
 Of some inclusive and unfolding plan?

Are mysteries disclosed? misgivings stilled?
 Dark doubts disproved? hope's prophecies fulfilled?
 We only hear our cries
 Re-echoed from the skies
 In the vast, awful silence God has willed.

Obituary Notice of Roger Averill.

Oh, brother sweet! what would'st thou have me say?
 Sleep well, farewell; the night is for the day
 And not the day for night!
 Sleep well, till morning light
 Shall break thy rest; then rise, and go thy way!

OBITUARY NOTICE OF ROGER AVERILL.*

ROGER AVERILL was born in Salisbury, in this state, on the 14th of August, 1809. He came of good New England stock, of hard-working, God-fearing ancestors, among whom were some of the earliest settlers of the state. His grand-parents, Samuel Averill and John Whittlesey, were natives of Washington, Conn., from which town his parents, Nathaniel P. Averill and Mary Whittlesey, removed to Salisbury in 1805.

One of a family of seven children, reared on a small farm, his education had of course to be mainly of his own earning. By the aid of the common school and a public library, by farming in summer and teaching in winter, he prepared for college under the guidance of his brother Chester, a much esteemed professor in Union College, and was graduated from that institution with honor in 1832.

Of the early surroundings of the two brothers, and the inspiring influences of the old homestead, Prof. Reid gives a pleasant picture in his discourse on the character of the elder brother. Their boyhood was spent in the picturesque valley of Wetogue, on the banks of the Housatonic, near the blue hills of Berkshire. The paternal acres were bounded by the beautiful Twin Lakes and the meadow-bordered river. A fairer spot there is not in the state, and the home was a jewel worthy of its setting. Here the sons grew up helpful, thoughtful and conscientious. Their mother's long life of cheerful activity and bright intelligence was a constant benediction of sunshine and gentleness. Their father's generous good-fellowship and racy shrewdness would afford another of the thousand refutations of the popular modern misconception of the old-fashioned Puritan. Around such a hearth clustered all social, domestic and patriotic virtues. The characters launched from such beginnings were not to be stranded on the shallows of dissipation or idleness.

The subject of this sketch was admitted to the bar in 1837, after studying law with Judge (afterward Chief Justice) Church, in his native town, where he opened a law office, after teaching in its academy. In 1849 he removed to Danbury, and at once attained a wide and successful practice.

Of fine personal appearance, with a ceremonious courtliness of the old school—a ready man of business, industrious by instinct, sound of

* Prepared at the request of the Reporter, by Lyman D. Brewster, Esq., of the Fairfield County bar.

Obituary Notice of Roger Averill.

judgment, and careful in advice, seizing and presenting in an effective way the strong points of a case to a jury, and securing the confidence of the court by the general justness of his legal propositions, he always stood well in the ranks of his profession, to which he was greatly attached, and whose honor and welfare no one had more nearly at heart. A man of instant impressiveness, his native power was constrained by a caution so guarded and ingrained that he sometimes failed to give in expression the full force of his thought. His methodical mind, rarely disturbed by the flashes of impulse, loved best the safety of considered courses and predetermined conclusions. But his formalism was based on the wisdom of experience, and his sense of justice was often a match for the most erudite opponent. Wary, and slow to begin litigation, when war was once declared he fought to the last the battle of his clients, as many a report of re-contested cases bears witness. Conservative by nature, and apt to keep his own secrets well, he was open, candid and thorough in his dealings with his clients, whose life-long fealty he grappled to himself with "hooks of steel," when they realized the virtue of his wise and peace-advising counsels.

In the public service he filled many functions, beginning with all the various and useful apprenticeships of the country lawyer. As town clerk, judge of probate, school visitor, trustee of the State Normal School, member of the State Board of Education, member of the Legislature, presiding officer in the Senate, and in other offices of trust, he discharged his official and fiduciary duties with acceptance.

It was his good fortune to be of good service to the republic in its peril. In the spring of 1861 he was as prominent a leader of the political party which opposed the election of President Lincoln as any in western Connecticut. Constitutionally cautious as he was, the instant the news came of the assault on Fort Sumpter, he hastened to fling his flag to the April breeze, first of his townsmen, waiting for no following, and burning at once all bridges of compromise or surrender. Thenceforth he devoted himself enthusiastically and unsparingly to the success of the Union arms. His words of cheer and counsel on many a public occasion, his untiring efforts in the enlistment of the soldiers and the care of their families, and his conspicuous services as Lieutenant Governor during the four years of the war, have linked his name with the imperishable memories of that heroic struggle, and constitute his worthiest claim to remembrance among the public men of his time.

After the war his participation in public affairs and the care of private trusts prevented that devotion to strictly legal studies and pursuits so essential to the highest success in his profession. His interest however in everything tending to its purity and welfare remained unabated. He was one of the organizers of the American Bar Association, and an active participant in its proceedings up to the year of his death. He was for several years acting chairman of the bar of his county. A

Obituary Sketch of Charles F. Sedgwick.

good parliamentarian, prompt, decided and dignified, he was often chosen to preside in public assemblages.

His domestic life was one of almost unbroken felicity, as son, brother, husband, and father. He married in October, 1844, Maria D. White, of Danbury, who died in February, 1860, leaving four children now living, his two sons following their father's profession. In September, 1861, he married Mary A. Perry, of Southport, who survives him.

He died at Danbury, December 9th, 1883, at the ripe age of seventy-four, untouched by the infirmities of old age. At seventy he had the erect form and ruddy look that characterized him at sixty.

His life had been one of such perfect health that the last year's confinement from heart disease and his long struggle with the inevitable tried his courage and resignation to the utmost. "But," to use the words of his neighbor and pastor, "he became at last wholly resigned to the Divine will, and the Christian hope sustained his last hours." For the last twenty years of his life he was an active and faithful member of the Congregational church of his fathers, and an unfailing attendant on its ministrations.

OBITUARY SKETCH OF CHARLES F. SEDGWICK.*

CHARLES FREDERICK SEDGWICK was born in Cornwall, Litchfield County, Conn., Sept. 1, 1795. His grandfather, Gen. John Sedgwick, was a major in the Revolutionary army, and a major general of the state militia. His ancestry is traced to Robert Sedgwick, one of Cromwell's generals.

He was a brother of the late Albert Sedgwick, who was for many years sheriff of Litchfield County and School Fund Commissioner of this state; and a cousin of the renowned Gen. John Sedgwick of the sixth corps of the army of the Potomac, who was killed at Spottsylvania, Va., in the late civil war.

After graduating at Williams College, 1813, he took charge of an academy in Sharon, Conn., and at the same time studied law, and was admitted to the bar, March, 1820, in Litchfield County. He immediately located in Sharon, and there continued in the practice of his profession and ended his life work. He was married to Betsey, daughter of Judge Cyrus Swan of Sharon, Oct. 15th, 1821. She and eight of their children survive him.

He was early a member of the Legislature in both of its branches, a judge of the court of probate for the district of Sharon, and for the last eighteen years of his professional activity, and until his health began to fail, State's Attorney for the county.

* Prepared at the request of the Reporter by Donald J. Warner, Esq., of the Litchfield County bar.

Obituary Sketch of Charles F. Sedgwick.

He inherited and manifested a special admiration for military affairs, and was appointed brigadier general of the state militia in 1829, and afterwards major general of the third military division of the state.

Physically, he was a remarkable man; large, tall, and erect, his appearance in and out of the court-room was attractive and commanding. As a lawyer not arrogant, not sarcastic, not brilliant, always courteous, a ready, fluent advocate, presenting his views of the case on trial with force and zeal, commanding the respect of the court and jury.

In the discharge of his duty as a public prosecutor, the administration of his office was characterized by the application of the principle "that ninety-nine guilty persons should escape, rather than one innocent person should suffer." His habits were exemplary; tobacco and intoxicants in all their forms were to him abhorrent.

The current events of the day were all noted by him, and he delighted in works of history, biography and genealogy. His wonderfully retentive memory, bodily vigor, and genial nature made him a delightful talker in the social circle, and eminently useful in furnishing information of and concerning persons and their affairs. If it became necessary to find a collateral or other heir to an estate, or to insert a branch in the genealogical tree of a family in western Connecticut, Gen. Sedgwick was referred to as a living compendium of the required information, and his detailed reminiscences of the peculiarities and characteristics of persons always interested his hearers and often elicited their merriment.

His centennial address and history of the town of Sharon in 1865, is a valuable depository of knowledge for the inhabitants of the town. His address at Litchfield in April, 1870, entitled "Fifty Years at the Bar," descriptive of the lawyers and judges of the courts of his time, is an acquisition to the legal literature of our state, which should be preserved in an enduring form.

The members of the bar of Litchfield County manifested their esteem for him from time to time, by soliciting his appointment to the office he so long held; and to show his appreciation thereof, I will quote the concluding remarks of his address:—

"Standing here alone, the only member of this bar who has been in practice for fifty years, I take pleasure in expressing to my brethren of more recent experience, the deepest gratitude for the pleasant and friendly relations they have permitted me to enjoy with them during the whole of our acquaintance. By their kind amenities and the favor of the judges, the rays of my evening sun have fallen upon me softer than did those of my noon-day. These precious remembrances will remain with me as long as I have consciousness; and in conclusion I say to my brethren, not as a thoughtless wish, but as an honest prayer, May God bless you, each and all."

He lived soberly, he waited for death calmly, and died in commu-

Obituary Notice of Samuel H. Huntington.

nion with the Congregational church at Sharon, March 9th, 1882, in his 87th year.

OBITUARY NOTICE OF SAMUEL H. HUNTINGTON.

SAMUEL HOWARD HUNTINGTON, at the time of his death the oldest member of the Hartford County bar, died at the city of Hartford on the 4th day of February, 1880, at the age of eighty-six. He was born at Suffield in this state, December 4th, 1793, his father being Hezekiah Huntington, who was United States District Attorney for about twenty-five years in the early part of the present century, and who removed to Hartford in 1813. Mr. Huntington graduated at Yale College in 1818, and immediately after studied law, and on his admission to the bar settled in the city of Hartford. He did not however devote himself very long to the practice of his profession, but always held a recognized and honorable relation to it. He was clerk of the State Senate in 1829. In the years 1842, 1843, 1846 and 1850, he was Judge of the County Court, the appointment then being an annual one. On the organization of the Court of Claims at Washington in 1863, he was made its chief clerk, and later published, with Judge Nott of that court, seven volumes of reports of its decisions. This office he resigned, on account of advancing years, in 1873.

In 1825 he married Catharine H., daughter of Mr. George Brinley, who died in 1832. In 1835 he married Sarah B., daughter of Mr. Robert Watkinson. He left three sons and four daughters, children of his second wife.

Judge Huntington was a man of fine presence, tall, and with a military erectness; with much positiveness of opinion he united gentleness of manner and great kindness of heart. He had a remarkably vigorous constitution, which he was able by moderation of life and general good habits to preserve unimpaired into old age. He had an even temperament and a sound judgment, and was a man of established integrity. He was through life an earnest adherent of the Episcopal Church, was nine times sent as a lay delegate to the general conventions of the church, was for twenty-three years secretary of the corporation of Trinity College at Hartford, and for twenty-eight years one of its trustees, and was for more than thirty years one of the trustees of the Bishop's Fund of the diocese. He took an early and very special interest in the mission of the church in Greece.

His mind was active and vigorous to a time very near his death. He ended at last peacefully a life full of manly and Christian virtues, holding in a very high degree the public respect and esteem. R.

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ABATEMENT OF SUIT BY PENDENCY OF ANOTHER.

To abate a new suit on the ground of the pendency of another, both must be of the same character, between the same parties, and brought for the same purpose. *La Croix v. County Commissioners*, 321.

ACCOMPlice.

See INTOXICATING LIQUORS, 5, 6.

ADVERSE POSSESSION.

1. A party taking possession of land under a contract of sale and in expectation of a conveyance under the contract, is not holding adversely to the legal owner, and he can change his licensed possession into an adverse one only by explicit acts which give the owner notice of such adverse holding. *Harral v. Leverty*, 46.

2. A party in possession in such a case is not properly a tenant at will, but a mere licensee. *Ib.*

See also HIGHWAY, 1; MORTGAGE, 1; NOTICE OF EQUITY, 1; PRE-TENDED TITLE, 1, 2.

ASSESSMENT OF BENEFITS.

See CITY ASSESSMENT.

ATTACHMENT.

See INSOLVENT ACT, 1, 2; NOTES AND BILLS, 17.

ATTORNEYS AT LAW (WOMEN ADMITTED AS).

The statute (Revision of 1875, p. 44, sec. 29,) provides that the Superior Court "may admit as attorneys such persons as are qualified therefor agreeably to the rules established by the judges of said court." This statute has come down, with some changes, from the year 1750, and in essentially its present form from the year 1821. Held that under it a woman could be admitted as an attorney. *In re Hall*, 181.

BRIDGE.

See HIGHWAY, 3.

BUILDERS' LIEN.

Where a claim secured by a builders' lien has become barred by the statute of limitations, the lien can not be enforced against the property.

Hills v. Halliwell, 270.

CHARGE TO JURY.

1. Where there are no facts in evidence on which a request for a charge is based, the judge is not bound to give any instruction to the jury upon it. *Allen v. Rundle*, 9.

2. The omission to charge in writing upon written requests, as required by statute (Gen. Statutes, p. 442, sec. 2,) would be ground for granting a new trial, unless waived by the party making the request or occasioning no injury. *Ib.*

CITY.

1. A city is not bound to maintain a railing in front of the numerous basement offices and shops that line its business streets. *Beardsley v. City of Hartford*, 529.
2. As cities are, by reason of special advantages, burdened with special duties as to highways from which country towns are exempt, they should have the benefit of exemptions from liability arising out of the necessities of their business. *Ib.*
3. Open basement descents being necessary to the business of a city, the failure of the city to erect a barrier in front of them is not of itself negligence, and the city is not liable to a passer-by who, without negligence on his part, falls down such descents. *Ib.*
4. There is no negligence on the part of a city, in the omission to do that which it either has no right to do, or which it would be unreasonable for it to do. *Ib.*

CITY ASSESSMENT.

1. The property of the state within the city of Hartford can not be assessed for benefit received from the construction of a public sewer. *State of Connecticut v. City of Hartford*, 80.
2. The charter of the city provides that the expense of public improvements may be assessed "upon the persons whose property is, in the judgment of the common council, specially benefited thereby." Held that, to make the state liable to such assessment, it was necessary that it should have been expressly mentioned or that the intention to include it should be clearly implied. *Ib.*
3. The legislature has power to make the property of the state liable to such an assessment. *Ib.*

CONFLICT OF LAWS.

See PROBATE OF WILL, 1.

CONSTITUTIONAL PROHIBITION OF INCREASED OFFICIAL COMPENSATION.

The constitution of the state (24th Amendment) provides that "neither the General Assembly nor any county, city, borough, town or school district, shall have power to grant any extra compensation to any public officer, employee, agent or servant, or increase the compensation of any public officer or employee, to take effect during the continuance in office of any person whose salary might be increased thereby." Held that a person employed as tillerman of a ladder carriage in the fire department of a city, at a fixed yearly salary, payable monthly, and who was to hold his place during good behavior, was within the provision, and that his salary could not be increased during his continuance in the employment. *Wright v. City of Hartford*, 546.

CONTRIBUTION.

See INSURANCE COMPANY, 2.

CORPORATION.

1. The defendant, a manufacturing corporation, made its note for \$40,000, payable to its own order, and the plaintiffs, with three others, all directors of the company, guaranteed its payment; the company making a mortgage to the guarantors of nearly all its property as security for their liability. The object was to raise money to pay the floating indebtedness of the company and enable it to go on with its business. Held that the directors had power to borrow money for this purpose

and to give necessary security; and that the mortgage was therefore valid, although it conveyed all or nearly all the property of the company. *Hopson v. Extra Axle & Spring Co.*, 597.

2. And that it did not alter the case that the directors themselves were the guarantors for whose security the mortgage was taken. *Ib.*
3. The company, having received the money borrowed and used it in paying its debts, would seem not to be in a position to claim that the mortgage was invalid. *Ib.*

See also MASTER AND SERVANT, 6; NOTES AND BILLS, 5, 6; STOCK DIVIDEND, 1.

COSTS.

1. A plaintiff who has paid costs on an amendment of his declaration, and who finally recovers judgment, can recover no costs for the period during which he paid costs. *Melony v. Somers*, 520.
2. And this rule includes court and clerk fees paid by him as well as other costs. *Ib.*

See also WILL, 17.

COUNTY COMMISSIONERS.

1. The act of 1881, which gives to the county commissioners in each county sole and final jurisdiction of the granting and revoking of licenses for the sale of intoxicating liquors in the county, does not constitute them a court within the meaning of the constitution of the state. *La Croix v. County Commissioners*, 321.
2. It is therefore no objection to the act that it does not provide for a trial by jury of the question whether a licensee has violated the law or for an appeal from a revocation of his license by the commissioners on the ground of such violation. *Ib.*
3. The county commissioners, being only a board and not a court, a writ of prohibition can not be issued against them by the Superior Court, for such a writ, in the absence of a statute authorizing it, lies only against an inferior judicial tribunal. *Ib.*
4. The defendants, *W* and *M*, one as principal and the other as surety, gave bond to the state in \$5,000 that *W* should faithfully discharge the duties of county commissioner. By statute it was a part of the duties of the board of county commissioners, which consisted of three members, to act upon the granting of licenses for the sale of liquors in the several towns of the county, and to receive and pay over to the towns the fees paid upon the granting of such licenses. After *W* had assumed the office his associates made him treasurer of the board, and as such he received money paid for licenses, and appropriated to his own use over \$5,000 of it. In a suit brought by the state on the bond it was held—1. That *W*'s acts as treasurer were covered by the bond. 2. That, the statute (Acts of 1877, ch. 129,) requiring the bond to be given to the state, the action could be maintained by the state. *State of Connecticut v. Wright*, 580.

DAMAGES (EXCESSIVE).

1. Where a verdict is for excessive damages, and it clearly appears that the jury must have been governed by prejudice or partiality or by a grossly mistaken view of the case, it is the duty of the court to grant a new trial. *Haight v. Hoyt*, 588.
2. Where in an action for slander in the defendant's stating that the plaintiff burned his barns, the jury returned a verdict for \$6,733.87,

and on being sent out by the judge for a reconsideration of the damages, returned another verdict for \$4,000, and it appeared that the declarations were made by the defendant in the honest belief that they were true, that the fire was incendiary, and that the plaintiff had borne and expressed malice against the defendant, and that no one else upon full investigation was suspected, and that the plaintiff had sustained little injury from the declarations; it was held that a new trial should be granted on the ground of excessive damages. *Ib.*

DURESS.

Where a person pays under compulsion just what he ought to have paid voluntarily, he has no standing in justice and equity to recover the money back. *McVane v. Williams*, 548.

See also PRACTICE ACT, 4.

EMPLOYER'S NEGLIGENCE.

See MASTER AND SERVANT, 2, 3, 6.
ENDORSEMENT.

See NOTES AND BILLS, 7, 8, 10, 18.

EQUITABLE ASSIGNMENT OF STOCK.

1. The plaintiff was a niece of *T.*, who was a widower seventy years of age, and without children, and with a large estate, and had at his request and on his promise to compensate her amply, gone to live with and take care of him. After she had lived with him five years he spoke of intending to make his will and give her a bequest, which he explained, and asked her if she would be satisfied with it. She replied that she would. He soon after informed her that he had made the will. He did in fact make the will, which was the one left by him at his death five years later, and a part of the bequest to her was ten shares of the stock of the *Aetna* Life Insurance Company, which was all that he owned. At the time he spoke to her about the bequest, he said that he should do more for her from time to time. About a year later he handed her the certificate for the ten shares, saying "I give this to you." She took it and put it in a drawer with her valuable papers. A few months later, the insurance company having issued to him as the owner of the ten shares, forty shares of new stock created out of its surplus, he delivered the certificate to the plaintiff, saying to her, "This insurance stock of yours is good stock; they give forty shares for ten; it is only a change of form, that is all; I paid nothing for it." She took the certificate and placed it with the other. The court found that he intended to vest in her the ownership of the forty shares as well as of the original ten, and that both parties supposed them to have become her property. She continued to serve him faithfully, till his death at the age of eighty-one. Held, that an equitable title to both the ten shares and the forty vested in the plaintiff. *Reed v. Copeland*, 472.

2. And held that the transaction was not to be regarded as a testamentary gift, and so needing to be in writing, as *T*'s promise "to do more for her from time to time, showed that what more he intended to do was to be done in his life-time. *Ib.*

3. Also that the transaction was not invalid under the statute of frauds, because not in writing. The delivery of the certificates was a symbolical delivery of the stock, whereby the contract became executed.

Ib.

4. And the case resting on equitable ground, a court of equity would not allow the plaintiff to be wronged by the interposition of the statute against her. *Ib.*
5. And held not to affect the case that the charter and by-laws of the insurance company provide that transfers of stock shall be made only at the office of the company, by the shareholder or his attorney, on surrender of the certificate. This provision relates only to the legal title to the stock. *Ib.*
6. In an equitable assignment the assignor, retaining the legal title, becomes a trustee for the assignee. *Ib.*
7. And held not to affect the case that the will gave the plaintiff a legacy, which included the ten original shares of stock, and which was to be in lieu of all claims on the testator's estate, and that she had accepted the legacy. The stock was given her by the testator before his death, and therefore at his death constituted no part of his estate, and her right to the forty shares constituted therefore no claim on his estate. She was simply taking what was already her own. *Ib.*

EQUITABLE INTEREST IN LAND.

A, owning an equity of redemption of only nominal value in a tract of land subject to several mortgages, agreed with *B* to sell him a part of the tract for a price agreed, the proceeds to be applied in part payment of the mortgages. The mortgagees consented to release the portion for the payment proposed, which *B* was to mortgage to a savings bank to raise the money to make the payment. The mortgagees thereupon executed a release to *A* of the portion in question, and *A* made a warranty deed to *B*, the papers all being deposited with the savings bank until the transaction was completed. One of the mortgagees however was an administrator and another a guardian, and the treasurer of the savings bank was of opinion that they could not, under the statute, release a part of the mortgaged property, and declined to make a loan on the part unless the whole tract was released. *B* therefore advised *A* to get this done, but *A* was not able to accomplish it and so informed *B*. *B* soon after procured elsewhere the money needed to purchase the part and informed *A* that he had it ready whenever he should make him a perfect title. Thus matters stood until *B* put upon record a caveat, claiming an equitable title to the portion in question and describing the release of a part, as at first proposed, as insufficient. Afterwards *C* purchased the equity in the whole tract at a sale of it by *A*'s assignee in bankruptcy. Upon a suit in equity brought by *C* against *B* to remove the cloud from the title, it was held that the title expected by *B* under the agreement and demanded by the caveat being one which required a release of the whole tract by the mortgagees, which they were not bound to give and which they had not authorized *A* to stipulate for, *B* had not acquired an equitable title to the portion of the land in question. *Treadwell v. Brooks*, 262.

EQUITY.

An equitable remedy that existed against a party in his life-time, exists equally against his legal representatives after his death. *Reed v. Cope-land*, 472.

ESTOPPEL IN PAIS.

1. A party is not estopped by an admission made in ignorance of his rights, induced by an innocent mistake of material facts. *Town of Clinton v. Town of Haddam*, 84.

2. The selectmen of the town of *H* received notice from the selectmen of the town of *C* that a pauper belonging to the former town was on expense in the latter town. The selectmen of *H*, believing that the pauper in fact belonged to their town, wrote the selectmen of *C*, requesting them to be as economical as possible in the matter and promising to pay for the supplies. The supplies were however paid for by a relative. Four years later, the pauper again needing aid from the town, the selectmen of *H* were duly notified of the fact and the supplies were furnished by the town of *C*. While they were being furnished the selectmen of *H* still believed that the pauper belonged to *H*, and conceded this to the selectmen of *C*, who by reason of it took no steps to investigate the matter or to hold any other town responsible. The means of knowledge were however equally open to both parties. In a suit brought by the town of *C* against the town of *H* for the supplies last furnished, it was held that the defendants were not estopped from showing that the pauper was not settled in *H*. *Ib.*

See also **EVIDENCE**, 8; **TITLE BY ESTOPPEL**, 1.

EVIDENCE.

1. *B* executed to the plaintiffs his note on demand, on the back of which the defendants signed the following guaranty:—"For value received, we jointly and severally guarantee the within note good and collectible until paid." In a suit brought on the guaranty several years later, and without having brought suit against the maker, whom the plaintiffs claimed to have been insolvent, the plaintiffs offered evidence that it was understood between the maker, the guarantors and themselves at the time the note was made, that the maker had signed it without consideration, at the request and for the accommodation of the guarantors, and upon their promise that they would take care of it and pay it within a short time. Held that this evidence was inadmissible as going to establish at the very making of the note an oral agreement in direct conflict with the written guaranty. *Allen v. Rundle*, 9.
2. And held that it was not admissible for the purpose of establishing a waiver by the guarantors of the institution of proceedings against the maker for the collection of the note, as it would produce the same effect with a material change of the written contract. *Ib.*
3. Nor admissible to estop the guarantors. Promissory representations as to future action dependent upon a contract to be entered into, do not create an estoppel. *Ib.*
4. It is admissible to prove the time when a certain occurrence, foreign to the case, took place, for the purpose of fixing by it the time when a certain act, within the case, was done. *Quintard v. Corcoran*, 34.
5. An engineer who has had experience in making plans and estimates for the building of bridges and has superintended their construction, can properly testify as an expert with regard to the probable cost of a bridge, although he has had no experience as a practical bridge builder. *Bryan v. Town of Branford*, 246.
6. And it does not affect the case that he has obtained the prices of the materials for the bridge from persons who deal in such articles. *Ib.*
7. Upon the question whether certain iron bought of *M. & Co.*, who were iron brokers, was sold as their own or for some other party, the court charged the jury that if they should find that *M. & Co.* were brokers and as brokers selling such iron at the time and that the purchaser

knew this, it would of itself be evidence of notice to the purchaser that they were not the owners but were selling for some one else. Held to be erroneous. *Elwell v. Mersick*, 272.

8. The question whether the loss of a document has been satisfactorily proved, so that secondary evidence of its contents can be admitted, is wholly one of discretion with the judge trying the case, and can not be reviewed on error. *Ib.*
9. It is enough if the preliminary proof establishes a reasonable presumption of the loss of the document. *Ib.*
10. Where the original paper is in the hands of a third person, out of the jurisdiction of the court, secondary evidence of its contents is admissible. *Ib.*
11. This rule applied to a letter-press copy of a telegraphic dispatch, accompanied by proof that the dispatch was sent. *Ib.*
12. Also to invoices of goods, when the originals were on file in the custom house in another state. *Ib.*

See also INTOXICATING LIQUORS, 18, 19, 20; TRADE MARK, 7.

EXECUTORS AND ADMINISTRATORS.

1. An administrator, carrying on a farm that belonged to the estate of the intestate, purchased on credit a yoke of oxen to be used on the farm. Held that the administrator personally was liable to the seller for the price, and that the estate was not liable. *Hallock v. Smith*, 127.
2. And held that the estate was not rendered liable in equity by reason of the fact that the oxen had been sold by the administrator and the proceeds used in paying for labor hired in carrying on the farm. *Ib.*
3. The carrying on of a farm belonging to the estate is no part of an administrator's proper duties; but the administrator would alone have been liable, even if the debt had been incurred in the ordinary administration of the estate. *Ib.*

See also MORTGAGE, 3.

FALSE IMPRISONMENT.

1. A tax warrant directed the keeper of the jail, in case any person was committed upon it, to keep such person safely until he should pay the tax and the fees of the officer for service. The plaintiff claimed that the defendant's fees were excessive and illegal, and that if they were so he was liable to the plaintiff for false imprisonment. The judge charged that, if the fees were excessive, the defendant yet was not liable as a trespasser unless the jury should find that he made them so in bad faith and for the purpose of keeping the plaintiff in jail. Held to be erroneous. *Wilcox v. Gladwin*, 78.
2. The defendant had no right to hold the plaintiff in jail until he paid fees which were illegal. *Ib.*

FELLOW SERVANT.

See MASTER AND SERVANT, 3, 6.

FOREIGN ATTACHMENT.

Where an officer, receiving for service an execution in a foreign attachment suit, neglects to make personal demand on the garnishee within sixty days after the rendition of the judgment, the cause of action against him for the default accrues at the expiration of the sixty days, and not upon the rendering of judgment against the plaintiff in a *scire facias* afterwards brought against the garnishee. *Smith v. Yale*, 526.

See also TRADE MARK, 1.

FRAUDULENT CONVEYANCE.

1. Under our statute with regard to fraudulent conveyances (Gen. Statutes, p. 345,) it is not necessary to prove a specific design to defraud the particular creditor who assails the conveyance; the intent to defraud one creditor renders the conveyance void as to all. *Allen v. Rundle*, 10.
2. The language of the statute differs somewhat from that of 13 Eliz, c. 5, but it is essentially copied from it and must receive a similar construction. *Ib.*

FRAUDS (STATUTE OF).

See **STATUTE OF FRAUDS.**

GUARANTY.

See **NOTES AND BILLS**, 1, 2, 3, 4, 16, 18, 19.

HIGHWAY.

1. A highway laid out by the original proprietors of a town ceased to be used by the public in 1812, but had never been legally discontinued. At that time the selectmen of the town undertook to convey to *S* by deed the interest of the town in it. *S* fenced the land, and he and his grantees held exclusive and adverse possession for over sixty years. Held—1. That the fact that the land was legally highway (if it was still so to be regarded,) did not prevent the adverse possession running against the private right of an adjoining owner. 2. That the deed of the selectmen was admissible, although passing no title, as giving character to the possession under it. *Cady v. Fitzsimmons*, 209.
2. Whether the facts were sufficient to warrant the inference of an abandonment of the highway as such by the public: *Quare.* The court inclined to so regard them. *Ib.*
3. Under the statute authorizing the laying out of highways, a highway with a draw-bridge can be laid out over a navigable river. *Bryan v. Town of Branford*, 246.
4. The statute (Gen. Statutes, p. 239, sec. 47,) which allows a committee to receive and regard as evidence on the question of the cost of a new highway, a bond for the construction of the highway for a stated price, applies to a highway so laid out. *Ib.*
5. The act of 1875 (Session Laws of 1875, p. 57,) which provides that such a bond shall stipulate that the work shall be done to the acceptance of the county commissioners, does not repeal, but is to be taken in connection with, the former act (Gen. Statutes, p. 239, sec. 47,) which provides that such a bond shall be conditioned for the doing of the work "in a specified time and manner." *Ib.*
6. It is no objection to the laying out of a highway on the ground of public convenience and necessity, that a considerable part of the public travel will be for the purpose of recreation and pleasure. The accommodation of that class of travellers is to be considered with that of the rest of the public. *Ib.*
7. Travel which is limited to the summer months is entitled to less weight in determining whether there is a public necessity, than that which is constant. *Ib.*
8. The owner of a mill-dam built a wall of stone twenty-three feet above the dam and filled the intervening space with earth, leaving a culvert for the water to pass through, not intending at that time to make any further use of the dam for mill purposes. He then dedicated the embankment for a highway across the river, and it was accepted by the

public, and used for several years until it was carried away by a flood. Held that the town in repairing was not bound to restore the embankment, but might construct a bridge for crossing at that place. *Welton v. Town of Wolcott*, 259.

9. A town has no power to agree, for a valuable consideration, to discontinue a highway. The mode of discontinuing highways is fixed by statute, with a provision for an appeal by any party aggrieved, and a town can not, at its mere pleasure, discontinue them. *Town of Cromwell v. Connecticut Brown Stone Quarry Co.*, 470.

10. And a town can not enforce a promise of the other party of which its own promise to destroy a public right was the consideration. *Ib.*

11. The statute (Gen. Statutes, p. 232, sec. 10,) provides that any person, injured in person or property by means of a defective road or bridge, may recover damages from the party bound to keep it in repair; but that no action shall be maintained "unless written notice of such injury, and of the time and place of its occurrence, shall within sixty days thereafter be given." A notice was given to the selectmen of the defendant town as follows: "You are hereby notified that C. T. of the town of B. was injured in his person and property by reason of a defective highway and want of railing on its sides, located in said town of W., and that this injury occurred on the 11th of September, 1879, on this highway, leading from the East Street Park, so called, in W., past the old G. H. place to N., and near the house of P. M. in said W." Held to be sufficient both as to the place where the injury was received, and as to the character of the injury. *Tuttle v. Town of Winchester*, 496.

12. The negligence of a town or city, to make it liable for an injury from a dangerous condition of a highway, must be such as would have made it liable to an indictment. *Beardsley v. City of Hartford*, 530.

13. In some of the states a distinction is made as to the rule of liability, between municipal corporations, or corporations proper, and quasi corporations, such as towns or counties, imposing a greater liability on the former. But this distinction is not made by the courts of the New England states, and it is helden by them that a municipal corporation is liable only by force of the statute. *Ib.*

14. The absence of a railing, where the public travel is endangered by the want of it, constitutes a defect in the highway, as rendering it unsafe for public travel, independently of any statutory provision as to a railing. *Ib.*

15. Where a highway prayed for would if laid out make it necessary that an existing highway with which it would connect should be put into better condition in consequence of the new travel that would be brought upon it, which expenditure would otherwise be unnecessary, the committee are to consider this expense in determining whether to lay out the highway prayed for. *Howe v. Town of Ridgefield*, 592.

16. The question as to the condition in which a highway ought to be kept, depends in a great degree upon the amount of travel upon it. *Ib.*
See also CITY, 2, 3, 4.

HUSBAND AND WIFE.
See RAILROAD COMPANY, 8.

INCREASE OF CAPITAL.
See STOCK DIVIDEND, 1.

INCREASE OF OFFICIAL COMPENSATION.

See CONSTITUTIONAL PROHIBITION OF, &c.

INDICTMENT.

See MURDER, 1.

INFANT.

1. A father has the right to dispose of the services of his minor son during his minority; but this right is not absolute. His own right to his services being limited and qualified he can convey only a limited and qualified right. *Barnes v. Barnes*, 572.
2. One qualification of this right is, that it dies with the death of the father. The son being emancipated by the death of the father, his obligation to perform the contract made for him by the father is at an end; certainly after he has arrived at years of discretion. *Ib.*
3. A father made an agreement with *B* that his son, then four months old, should live with and serve him till he was twenty-one years old, and that *B* during that time should provide him with food, clothing and schooling as if he were his own child. The boy's mother was then dead and his father died four years later. When the boy was nineteen years of age he made an agreement with *B* that the latter should relinquish his rights under the contract with the father, and should be released from the duty of further supporting him, and that he would thereafter pay *B* three dollars a week for his board while he remained with him. Held—1. That this agreement was a repudiation by the minor of the contract made between the father and *B*.—2. That the board furnished the minor by *B* being a necessary, he could recover reasonable compensation for it. *Ib.*

INTOXICATING LIQUORS.

1. A person licensed by the county commissioners to sell intoxicating liquors in a certain town, gave a bond to the treasurer of the town with sureties, as required by law, in the sum of \$1,000, the condition of which was that if he "should duly observe all laws relating to intoxicating liquors" it should be void. Held—1. That the keeping open a place on Sunday where intoxicating liquors were exposed for sale was a breach of the bond, although the act was forbidden by a statute with regard to Sunday and not by that relating to intoxicating liquors. 2. That it was not necessary that the bond should provide in terms that its amount was to be forfeited upon a breach, that being necessarily implied. 3. That it was not necessary that the act constituting a breach of the bond should be merely an abuse of a privilege granted by the license. 4. That it was not necessary that the plaintiff should have sustained any damage by reason of the breach of the bond. 5. That the \$1,000 was the measure of damages. *Quintard v. Corcoran*, 34.
2. A count in an information for selling intoxicating liquors contrary to law, that charges the defendant with "selling and exchanging" such liquors, is not bad for duplicity. *State v. Teahan*, 92.
3. A count charging the keeping of "intoxicating liquors" with intent to sell contrary to law, is not bad for uncertainty in not stating the kind and quantity of the liquors more definitely. *Ib.*
4. The jury having found the defendant guilty on both counts, the court imposed a separate fine on each count. Held to be no error. *Ib.*
5. The purchaser of liquor knowing it to be sold contrary to law is not to be regarded as aiding and abetting the crime and is not therefore crim-

inating himself in testifying to such sale, and his testimony is not to be regarded as that of an accomplice. *Ib.*

6. The statute (Gen. Statutes, p. 545, sec. 3,) which provides that "every person who shall assist, abet, counsel, cause, hire or command another to commit any offence, may be prosecuted and punished as if he were the principal offender," does not apply to the case of the purchaser of liquor sold contrary to law. *Ib.*
7. A written return made by the defendant to the United States internal revenue collector, declaring an intention to carry on the business of a retail liquor dealer for the ensuing year, with the payment of a tax thereon, is admissible on a trial for selling liquor contrary to law within that time, for the purpose of showing an intention to sell, both under a count for an actual sale and under one for keeping liquors with intent to sell. *Ib.*
8. Proof of a sale of intoxicating liquors will support a conviction for keeping the same liquors with intent to sell, where it satisfies the jury of such keeping and intent. *Ib.*
9. Licenses granted for the sale of intoxicating liquors, upon fees paid therefor, are not a contract between the state and the persons licensed, and are not property in any constitutional sense. *La Croix v. County Commissioners*, 321.
10. They form a part of the internal police system of the state, are granted in the exercise of the police power of the state, and may at any time be revoked by legislative authority. *Ib.*
11. The commissioners could take cognizance of an application for the revocation of a license on the ground of a violation of law by the licensee, while a criminal prosecution was pending against the licensee for the same violation of the law. *Ib.*
12. Under the statute (Gen. Statutes, p. 522, sec. 60,) which forbids the keeping open on Sunday of any place in which it is reputed that intoxicating liquors are kept for sale, an entire hotel may come within the statute as having such a reputation, although liquor may not have been sold in every room in it. *State v. Ryan*, 411.
13. Whether the reputation applies to the whole hotel or to a certain part of it is wholly a question of fact for the jury. *Ib.*
14. If it applies to the whole house, the occupant may yet keep it open on Sundays for the admission of boarders and travellers. *Ib.*
15. Under the statute (Gen. Statutes, p. 520, sec. 43,) which makes it an offense to keep a place in which it is reputed that intoxicating liquors are kept for sale, such reputation is not conclusive evidence of the guilt of the accused, but he may show by proper evidence that he did not in fact keep liquors for sale, and that the reputation is not well founded. *State v. Moriarty*, 415.
16. The statute in one section forbids the keeping of intoxicating liquors for sale, and in another the keeping a place in which it is reputed that intoxicating liquors are kept for sale. These two offenses are so far distinct that an acquittal of the former is not a bar to a conviction of the latter, although the times at which the offenses are charged to have been committed are the same. *Ib.*
17. In a prosecution for the former offense the whole burden of proof is on the state, while in one for the latter the burden of proof, after reputation is shown, is shifted upon the accused. An acquittal in the

former case may result from an insufficiency of proof on the part of the state, while upon the same facts a conviction in the latter case may result from an insufficiency of proof on the part of the accused. *Ib.*

18. Where the accused had kept the same place continuously for a year, and was charged with keeping a place in which it was reputed that intoxicating liquors were kept for sale on a certain day, it was held that evidence was admissible that liquors were actually kept by him exposed for sale at a time three months later, but within his continued occupancy of the place. *Ib.*
19. Such evidence would be of constantly diminishing weight with the lapse of time, but would be admissible, under instructions of the court as to the considerations affecting its weight. *Ib.*
20. It being a question of the intent with which the liquors were kept, and intent being generally a matter of continuance, the existence of the intent at the former time might be inferred, more or less strongly, from its existence later. *Ib.*

See also COUNTY COMMISSIONERS, 1, 2; SEARCH WARRANT, 1 to 4.

INSOLVENT ACT.

1. The fifth section of the insolvent act (Gen. Statutes, p. 379,) provides that "when a writ of attachment shall have been issued upon a claim founded on contract of one hundred dollars or more, upon which writ shall have been indorsed the affidavit of the plaintiff or his attorney that he believes such claim to be justly due, if the officer serving the same, after making demand of all such debtors as are found within his precincts, cannot find sufficient property to satisfy such attachment, * * the plaintiff may petition the court of probate for the appointment of a trustee to take possession of the property of such defendant for the benefit of his creditors." Held that the officer serving the writ was bound to attach real estate, if he could find sufficient to satisfy the claim. *Hawes's Appeal from Probate*, 317.

2. Also that it made no difference if the real estate was incumbered, so long as the equity of redemption was of sufficient value. *Ib*

INSURANCE COMPANY.

1. The charter of a life insurance company authorized the trustees of the company at any time at their discretion to establish a guaranty capital, not to exceed \$100,000, to be paid in cash, notes, or approved securities, to be applied, if necessary, to the payment of its debts; if not used, to be returned, and if used, to be refunded with interest from its first surplus receipts. The company was afterwards declared by the insurance commissioner to be insolvent to the extent of \$48,000, and forbidden to issue policies unless the deficiency was made good. The trustees thereupon procured from the stockholders a subscription of \$75,000 as a guarantee fund under the charter, the subscription providing that the subscribers should severally transfer to the company approved securities to the amount of their subscriptions, the income from them to be paid to the "owners thereof;" the company to pay six per cent. for the use of the securities, which were to be used only when the resources of the company were exhausted, and if not used to be returned at the end of three years; a receipt being given to each subscriber for the securities as "payment" of his subscription. The insurance commissioner accepted this guarantee fund as supplying the deficiency in the capital and allowed the company to go on. *B* sub-

scribed \$10,000 to the fund and transferred to the company railroad stock to that amount. He afterwards died, and at the end of the three years the stock was re-transferred by the company to his executors, and by them afterwards distributed as a part of his estate under an order of the probate court. The insurance company was subsequently judicially declared insolvent, and went into the hands of a receiver, who made demand on the executor for the sum of \$10,000, and also for the securities. Held—1. That *B*'s obligation was for the payment of his subscription in money, and was to be regarded as secured only, and not paid, by the transfer of the stock. 2. That the right of action did not accrue when the stock was transferred by the company to the executors, but when demand was made on the executors by the receiver for the payment of the subscription. *Russell v. Bristol*, 221.

2. Several insurance companies combined to defend against a claim for a loss by fire, agreeing that each should pay such proportion of the expense as the amount of its insurance bore to the whole amount of insurance, and appointing a committee to manage the defence with full power to incur all necessary expense. The plaintiff, one of the companies, was afterwards sued by a person employed by the committee, for his services in the matter; it did not plead in abatement the non-joinder of the other companies, but the fact that the suit was brought was known to the present defendant, one of the companies, which did not request that such a plea be filed; and judgment was recovered against the plaintiff for the whole amount of the claim, besides which it was subjected to considerable expense and cost in the suit. The present defendant had objected to the claim made in that suit as unreasonable in amount and the present plaintiff defended against it on that ground, but it was admitted in the present suit to have been reasonable. The plaintiff afterwards brought a suit for contribution against the present defendant, which was the only company within the jurisdiction of the court, and the policy of which was of the same amount with the plaintiff's. At this time several of the companies had become insolvent or were dissolved and were without assets. The plaintiff had collected a portion of the amount from some of the other companies. Held—1. That by the agreement the signers subjected themselves to a joint liability to all persons rendering service to their agent, the committee. 2. That the provision that each company should contribute in proportion to the amount of its insurance, operated only as a rule of apportionment among themselves, and did not affect an outside creditor. 3. That although the plaintiff when sued might have pleaded in abatement the non-joinder of the other companies, it was not bound to do so as against this defendant, without its request, it having knowledge of the suit. 4. That the companies that were insolvent were to be laid out of the case in determining the amount that the other companies were bound to contribute to the plaintiff. 5. That the defendant, being the only company within the jurisdiction of the court, might be sued alone for contribution, and, its policy being of the same amount with the plaintiff's, was liable in the suit for half the amount remaining unpaid. 6. That the defendant was also liable to pay an equal share of the expense and cost to which the plaintiff was subjected in the suit of the creditor, the defendant objecting to the creditor's claim as unreasonable in amount, and it being proper

in the circumstances that the plaintiff should not pay it until it had been judicially investigated. 7. That it was not necessary that the defendant should be judicially concluded by that judgment, since, the claim being now admitted to be reasonable in amount, the defendant would have been holden if the plaintiff had paid it without a suit. 8. That the plaintiff and defendant were entitled to contribution from the other companies for what they had paid beyond their shares. *Security Ins. Co. v. St. Paul Ins. Co.*, 288.

3. A policy of insurance on property mortgaged to a savings bank was, by a memorandum on the policy, made payable to the savings bank to the amount of its mortgage. A collateral agreement was also made by the insurance company with the savings bank, that all policies which had been or might be issued by the insurance company and assigned or made payable to the savings bank, should not, as to the interest of the latter, be invalidated by any act or neglect of the mortgagor or owner, that the savings bank should pay for any increase of hazard, and that on payment being made to the savings bank the insurance company should be entitled to all the securities held by the savings bank. Both the policy and the agreement were under seal. The premium, constituting the consideration of the policy, was paid by the insured. Held—1. That the savings bank, not being a party to the policy, could not sue upon it alone, even though the promise was made for its benefit. 2. That the two instruments together constituted a contract between the insurance company and the savings bank, by which the latter became privy to the promise of the insurance company contained in the policy, to pay the loss to it; and that a suit at law could be maintained by the savings bank in its own name on that promise. *Meriden Savings Bank v. Home Ins. Co.*, 396.

4. If the savings bank had sued in the name of the mortgagor, the suit would have had to be brought on the policy alone; in which case there would have been a difficulty in its availing itself of the agreement of the insurance company that the acts of the mortgagor should not invalidate the policy. *Ib.*

5. It would be no objection that, if the savings bank could sue in its own name upon the contract in connection with the policy, the insurance company might be subjected to two suits for the same loss. The company had voluntarily placed itself in this position by making two contracts with two different parties relative to the same subject matter. *Ib.*

6. A policy of insurance upon a dwelling-house contained a provision that "if the dwelling-house hereby insured shall cease to be occupied as such, then this policy shall cease and be of no more effect." The house was described in the application as occupied by a tenant, and was so occupied at the time of the insurance. The tenant left the house, taking with him all his furniture, about six o'clock on a certain evening, and the house was destroyed by fire about two o'clock the next morning. Held that the non-occupation avoided the policy. *Bennett v. Agricultural Ins. Co.*, 420.

7. The policy provided that all statements in the application should be "taken to be warranties on the part of the assured." The application contained the following questions and answers: Q. "How many acres of land in the place?" Ans. "Sixty." Q. "What is the value of the land and buildings?" Ans. "Seventeen hundred

dollars." Held, that the parties had made these matters material and that they must be so regarded whether they related to the risk or not; and that if the answers were not true in the sense in which they were taken by the parties, there could be no recovery. *Ib.*

8. A policy of fire insurance provided that in case of loss the insured should produce a certificate under the hand and seal of a magistrate, stating that he knew the character and circumstances of the assured, had inquired into the facts, and believed that the assured had, without fraud, sustained loss on the property insured, to the amount stated in the certificate. Held that the furnishing of such a certificate was not waived by the insurance company by its agent having received the proofs of the loss and having made no objection to them on the ground of the omission of the certificate; it not appearing that the agent was such for any such purpose, nor that he did more than transmit the proofs to the company. *Daniels v. Equitable Fire Ins. Co.*, 551.
9. Nor by the fact that the company objected to payment for the loss on other grounds. *Ib.*
10. Nor by the fact that the proofs had been in the hands of the company for two years, and that they had not called the attention of the assured to the want of the certificate. *Ib.*
11. The policy provided that if the insured premises should be so occupied or used as to increase the risk without the assent of the company, the policy should become void. The policy allowed the insured to use naphtha in his business, but with no fire or lights in the building except a small stove in the office. The assured, without the consent of the company, placed a stove in a room called the finishing room, in which there was frequently a large quantity of inflammable naphtha gas. Held that this was an increase of the risk which avoided the policy. *Ib.*

See also NOTES AND BILLS, 5, 6.

JUDGMENT.

1. The presumption of payment that exists in the case of a judgment that has run twenty years, is sufficient if not rebutted; but the fact that the judgment has not been paid may be shown. *Fanton v. Middlebrook*, 44.
2. And it makes no difference that the judgment was rendered in another state. *Ib.*
3. Nor that by the statute of that state no action could be brought upon it unless within six years from the time it was rendered. *Ib.*

JURISDICTION.

1. In a suit for a partition or sale of property held in common, the jurisdiction of the court is to be determined by the value of the property. *Fowler v. Fowler*, 256.
2. Whether, if the value is alleged in the complaint, that would not determine the jurisdiction: *Quere*. If no value is alleged the question can be raised by the pleadings. *Ib.*
3. Where in an action in the Court of Common Pleas by one tenant in common against another, for expenses incurred in repairing the property, the defendant filed a cross-complaint, praying for a sale of the property, and the court found, upon an answer filed by the plaintiff to that effect, that the property was of a value beyond the jurisdiction of the court, it was held that the cross-complaint should be dismissed. *Ib.*

JUROR (MISCONDUCT OF.)

1. A complaint for a new trial will not be entertained where the ground on which it is sought is the misconduct of a juror, affecting the verdict, although not discovered by the party seeking a new trial until it was too late to file a motion in arrest of judgment. *Brown v. Congdon*, 302.
2. A motion in arrest of judgment is the proper and only remedy in such a case. *Ib.*

See also **VERDICT, 1.**

KNOWLEDGE, CONTINUANCE OF HOW FAR PRESUMED.

1. The defendant, as an attorney-at-law, drew a mortgage of certain real estate to *R*, which was executed by *H* in his presence, he signing his name as a witness and taking the acknowledgment as a magistrate, and fully understanding the contents of the deed. Nine years later the defendant took a mortgage from *H* to himself of the same real estate. The first mortgage had never been put on record. Held that the law would not presume that the defendant, at the time he took his own mortgage, continued to have the knowledge of the prior mortgage which he had nine years before. *Goodwin v. Dean*, 517.
2. A case of this sort, where the knowledge was merely casual, and with nothing to impress the fact upon the mind, is very different from a case where there is a duty upon the party to remember, or the notice is of a fact affecting his interests. *Ib.*

LESSOR AND LESSEE.

Certain premises were leased in writing to *D* for one year with the privilege of five, the lease not being recorded. *D* elected to occupy for five years. During the second year the plaintiff purchased the premises, and repeatedly afterwards accepted from *D* the rent provided for by the lease. In a suit brought by the plaintiff before the expiration of the term for the possession of the premises, it was held that evidence was admissible against the plaintiff that he knew of the existence of the written lease and of its terms. *Whittemore v. Smith*, 376.

LIEN (BUILDERS').

See **BUILDERS' LIEN.**

LIMITATIONS (STATUTE OF).

The statute of limitations bars a suit upon a promissory note unless brought within six years. Another statute requires that a suit be brought by a creditor of a solvent estate within four months after a refusal of payment by the executor or administrator. A note was presented to the executors of a deceased person, the estate being solvent, within six months limited by the probate court for the presentation of claims, and on refusal of payment by the executors suit was brought against them upon it within four months after such refusal. At this time more than six years had elapsed since the right of action first accrued. Held that the suit was not barred. *Continental Life Ins. Co. v. Barber*, 568.

MASTER AND SERVANT.

1. A master is bound to provide for his servant a reasonably safe place for his work and reasonably safe appliances. *Wilson v. Willimantic Linen Co.*, 433.
2. Where, instead of attending personally to it he employs another, who does it negligently, so that the servant receives an injury by reason of the negligence, the master is equally liable. *Ib.*

3. The general rule that a servant can not recover for an injury caused by the negligence of a fellow-servant has no application to such a case. *Ib.*
4. While it is the duty of a servant to use ordinary care in noticing the condition of machinery at which he is working, yet he cannot be expected to notice latent defects or any that are not obvious to one not an expert in machinery. *Ib.*
5. If a servant has been guilty of negligence in such a matter, yet it must be negligence essentially contributing to the injury. *Ib.*
6. A manufacturing corporation employed a superintendent who had charge of all its machinery and works in several mills. Under him and appointed by him were overseers of the several rooms, whose duty it was to keep watch of the machinery and oversee the work in their respective rooms. These overseers appointed "second-hands" whose duty it was to act as overseers of the rooms in their absence. There was also an overseer of repairs, whose duty it was to make repairs on notice from the superintendent or overseer of a room that repairs were needed. Some new machinery having been procured the person setting it up notified the superintendent that collars were needed on certain counter-shafts before they were used, and the superintendent notified the overseer of repairs to put them on, but through negligence he failed to do so, and by reason of the want of a collar a counter-shaft fell and injured the plaintiff, an employee in the room. Held that the negligence was that of the corporation and that it was liable for the injury. *Ib.*
7. And held to make no difference that the plaintiff was not using the machine as an operative at the time of the injury, but was assisting the overseer of the room by his direction in setting up the counter-shaft preparatory to its being used by the operatives. *Ib.*

MARRIED WOMAN.

See **MORTGAGE**, 2; **RAILROAD COMPANY**, 8.

MORTGAGE.

1. A mortgage is not a "conveyance" under the statute against selling pretended titles. *Harral v. Leverty*, 46.
2. Certain lands with buildings thereon were purchased by *H*, and a conveyance of the same made at his request by the purchaser to his wife for her sole use. *H* gave his notes on time for the price, and signed a written agreement, to which his wife was not a party, to make with her a mortgage back of the property after a prior mortgage to a savings bank had been increased sufficiently to raise money to repair the buildings. Afterwards a new note and mortgage were executed by *H* and his wife to the savings bank for an increased amount, the old note and mortgage being settled in the transaction. The wife then refused to give the second mortgage in accordance with her husband's agreement. She had accepted the deed when it was given, but it did not appear that she knew of the agreement to make the mortgage. In a suit to compel her to execute the mortgage, it was held—1. That as the wife had parted with nothing the property was not to be protected in her hands under those principles which ordinarily protect the property of married women. 2. That the fact that she had signed the note and mortgage to the savings bank did not affect the case. 3. Nor the fact that she did not know of the agreement to give the mortgage when

she accepted the deed. When it came to her knowledge she could have surrendered the property and have been in no worse condition than before the deed was given; and this she was bound to do or else perform the agreement which was a material part of the consideration for the deed. 4. That the transaction created an equitable mortgage which the court would establish by its decree. *Hall v. Hall*, 104.

8. The statute (General Statutes, p. 355, sec 22,) provides that "the executor or administrator of any deceased mortgagor, or any guardian or conservator whose ward is a mortgagee, may, on the payment, satisfaction or sale of the mortgage debt, release the legal title to the mortgagor or party entitled thereto." Held not necessary that the release be of the whole mortgaged property on payment of the whole debt, but that a part might be released on payment of a part of the debt. *Treadwell v. Brooks*, 262.

4. While a suit for the foreclosure of a mortgage was pending the parties made a settlement under which the mortgagor was to pay the costs of the suit and the interest due within thirty days and at once to give the mortgagee a quitclaim deed of the mortgaged premises; the mortgagee to withdraw the suit and lease the premises to the mortgagor for a sum equal to the interest of the debt and to re-convey to him at any time within six months on his payment of the debt; which quitclaim deed and release were given according to the agreement. A tender of the amount of the debt was made after the expiration of the six months. Held—1. That a specific performance could not be decreed, because the money was not tendered within the six months.—2. That the transaction did not constitute in equity a new mortgage, it being clear upon the facts that the parties intended only a right on the part of the debtor to a re-conveyance upon a payment of the debt within the six months. *Phipps v. Munson*, 267.

5. The act of 1878 (Session Laws of 1878, ch. 120, sec. 2,) provides that upon a foreclosure the court shall, upon the motion of either party, appoint three appraisers, who shall, on the foreclosure taking effect, appraise and report to the court the value of the mortgaged property, which appraisal shall be conclusive upon the parties as to the value; and that in any later suit upon the mortgage debt the creditor shall recover only the difference between the value of the property as thus fixed, and the amount of his claim. Held that, under this statute, it was proper for the appraisers to report the whole value of the mortgaged property without reference to prior mortgages upon it, leaving the fact and amount of such prior incumbrances to be shown in any later suit upon the mortgage debt. *Sisson v. Tubbs*, 292.

6. Where *A* has a mortgage on two pieces of land and *B* acquires a later title to one of them, *B* cannot redeem his piece by paying *A* a proportionate share of the mortgage debt, but must pay the whole, and standing on that mortgage foreclose the mortgagor's interest in the other piece; the mortgage debt in that case being apportioned between himself as owner of the equity in one piece and the mortgagor as owning that in the other. *Andreas v. Hubbard*, 361.

7. And the same rule applies even though *A*, the mortgagee of the two pieces, has himself acquired the equity of redemption in the other piece. *Ib.*

8. Where however *A*, as mortgagee of the two pieces, ask for or consents to an apportionment, a court of equity will make it. *Ib.*

9. And where *A*, having acquired the equity of redemption in the other piece, asks for a foreclosure only of the piece of which *B* holds the equity, he will be considered as assenting to an apportionment of the mortgage debt. *Ib.*
10. The rule of apportionment in such cases is to apply the security to the debt according to its proportionate value. That is, as the value of the whole security is to the value of the particular part, so is the amount of the whole mortgage debt to the amount which is to be paid on redeeming that part. *Ib.*
11. Where *A* holds a mortgage on two pieces of land and *B* a later mortgage on the second piece and also on a third piece, and the first and second pieces are more than enough to satisfy the first mortgage debt, but the second and third pieces, with the second encumbered, are insufficient to satisfy the second mortgage, it is a rule of equity that the first piece shall be first applied upon its mortgage debt, so as to leave as much as possible of the second piece for the benefit of *B*'s mortgage. *Ib.*
12. This rule is one of easy application where, as in many of the states, the mortgaged property is sold by order of the court and the proceeds applied; but in this state, where the property itself is taken for the debt, the same principle is recognized. *Ib.*
13. Where *B* holds a second mortgage of one piece of land, previously mortgaged with others to *A*, and also of other lands not covered by *A*'s mortgage, but complicated with still other lands by reason of other later mortgages of those lands to other parties, which later mortgages give the holders of them by reason of their inadequacy a standing in equity for asking to be allowed to redeem *A*'s mortgage, *A* is not bound, in seeking a foreclosure of his mortgage, to make these other mortgagees defendants. *Ib.*
14. The right of these parties to redeem *A*'s mortgage would not appear of record and would depend entirely on the fact of their security being insufficient—a fact wholly extraneous, and of which *A* could not be supposed to have any knowledge. *Ib.*
15. Their duty, if they wished to get the benefit of the property mortgaged to *A*, would be to bring a suit for redemption, or at least to give notice to *A* that they claimed a right to redeem. *Ib.*
16. Their right to go into a court of equity and obtain a decree for redemption, would not be of itself an existing and recognized equity, but would be a mere equitable relation to the property, and their equity would be established by and depend upon the decree of the court. *Ib.*
17. And the equity thus decreed would take effect subject to all rights existing at the time the suit was brought. *Ib.*
18. Where a mortgagee has foreclosed a mortgage and his title has become absolute, the fact that the value of the mortgaged property is greater than the mortgage debt, constitutes no ground of equitable claim on the part of persons interested who were made parties to the suit. *Ib.*
19. And a party who, if he had gone seasonably into a court of equity could have had a right of redemption decreed in his favor, but who failed to do so, and neglected to give notice to the mortgagee of his claim of a right to redeem, and who had therefore at the time of the foreclosure no such known relation to the property as made it the duty of the mortgagee to make him a party, is not entitled to equitable aid on the ground of such excess of value. *Ib.*

20. The delivery of an endorsed note as collateral security does not divest the party delivering it of his equitable interest in the note, and he may properly bring a suit for the foreclosure of a mortgage given to secure it. A court of equity would not dismiss such a suit, but would require the party holding the note to be brought in as a party before passing a decree. *Hopson v. Etna Axle & Spring Co.*, 597.
21. And where, during the pendency of a suit so brought, the note was returned to the plaintiff, there was no longer any reason for making the former holder of it a party. *Ib.*

See also RAILROAD COMPANY, 3.

MOTION IN ARREST OF JUDGMENT.

See JUROR, MISCONDUCT OF.

MURDER.

The statute (Gen. Statutes, p. 498, sec. 1,) divides the crime of murder into murder in the first and second degrees, and provides that in all indictments for murder "the degree of the crime charged shall be alleged." Held not necessary that the indictment should set out the facts constituting the crime murder in the first degree as distinguished from that in the second degree, but that it is sufficient if, after stating the crime in the ordinary common law form, an averment be added that the prisoner did thereby commit murder in the first degree. *Smith v. The State*, 198.

NEGLIGENCE.

1. The plaintiffs in their declaration alleged the loss of a cargo of grain by the sinking of a canal boat towed by the defendants, and alleged that the negligence of the defendants caused the loss. The defendants demurred, the demurrer was overruled, and the case was heard in damages. On this hearing no evidence was offered by either party as to the negligence of the defendants or the absence of it. The court found the actual damage to be \$5000, but awarded only nominal damages. This court reversed the judgment on the ground that the burden of proof with regard to negligence rested on the defendants, and that in the absence of all proof they were to be considered guilty of negligence. The case went back to the lower court, when the defendants moved to be allowed to plead the general issue and have the case tried again upon the facts. Held that, the actual damage having been found and upon a trial in which no exception had been taken, the defendants were not entitled to plead anew and have a further hearing upon the facts, but that it was the duty of the lower court to render judgment against the defendants for the \$5000. *Crane v. Eastern Transportation Line*, 341.
2. The finding as to the loss of the cargo was only that "while at *P* during the night the canal boat sank and the entire cargo was lost." Held that, although this was not a finding that the loss was caused by the negligence of the defendants, yet that that fact was sufficiently established by the averment of the declaration that the loss occurred through their negligence, and the admission of the truth of this averment by the demurrer. *Ib.*
3. The finding of the court below contained the following paragraph: "The plaintiffs offered no evidence to prove negligence on the part of the defendants, and so the court does not find the defendants guilty of negligence. The defendants offered no evidence." Held not to be a

finding that there was no negligence on the part of the defendants, but only a statement that nothing was found on the subject. *Ib.*

See also **MASTER AND SERVANT**, 2, 5, 6; **RAILROAD COMPANY**, 6, 7, 8, 9, 11.

NEW TRIAL.

See **JUROR, MISCONDUCT OF**, 1.

NOTES AND BILLS.

1. A guaranty that a note is collectible is a conditional one, the condition being that diligence should be used in collecting it. *Allen v. Rundle*, 9.
2. Some courts of high authority in this country have held that the only evidence that the note is not collectible is the failure of legal proceedings, diligently pursued, to result in collection. Other courts of equal authority have held differently. It seems more in accordance with the general principles adopted by this court in cases of guaranty, and more just, not to require a suit, with all its attendant expense and trouble, where it must be fruitless, and to allow under some circumstances the diligence to be waived by the party for whose benefit it is required. *Ib.*
3. But where the exact diligence required is expressly stated in the contract, the want of it will not be excused. *Ib.*
4. In a suit upon a guaranty of the collectibility of a note the burden of proof is on the plaintiff to show, either that he has exhausted all legal remedies, or that the maker was insolvent, or that the guarantor had waived the legal proceedings. *Ib.*
5. *W*, who was president of a life insurance company, chartered with no unusual powers, indorsed in its name a note of a railroad company, of which he was also president, and procured the note discounted at the plaintiff bank, the proceeds being put to the credit of the railroad company. The note was a renewal, the proceeds of the original having been applied to the payment of an overdraft of the railroad company at the bank. *W* had, with the assent of the directors of the insurance company, been the manager of its finances, and had signed and indorsed its paper to a large amount as its president; but it did not appear that he had made any use of the company's name, with the knowledge of the directors, which they considered as binding on the company, except where it was understood that it received the proceeds or the direct benefit of the transaction. Held—1. That the insurance company had no power to indorse an accommodation note for a third party. 2. That if it had such power, yet *W*, as its president, had no implied authority from the facts stated to sign its name for such a purpose. *Aetna Nat. Bank v. Charter Oak Life Ins. Co.*, 167.
6. The insurance company held \$76,000 of a million dollars first mortgage bonds of the railroad company, and all its second mortgage bonds, amounting to \$1,250,000, as collateral security for a large indebtedness of the railroad company. The latter had no available funds to pay coupons of its first mortgage bonds that were falling due. The insurance company had before this generally provided for the payment of the coupons by loaning the money to the railroad company; but there existed no agreement on its part to provide for the payment of the coupons now falling due. One *C* was nominally the maker of the note, though it was really the note of the railroad company. *W*, at the time he got the note discounted, said to the officers of the bank that *C* was good, that the railroad company could not then meet its coupons but he

hoped it would be able to pay the note when due from earnings of the road, but that if not paid by the maker or the railroad company the insurance company would pay it, that it was for the interest of the insurance company to have the coupons paid promptly to keep up the credit of the bonds, and that it had ample security; and the cashier supposed from this that the discount was virtually for the benefit of the insurance company. Held that these facts were not sufficient to make the indorsement anything else than an accommodation one. *Ib.*

7. The note was payable to the order of the railroad company and was indorsed by the insurance company before the indorsement of the payee. Held that this form of indorsement under our law was notice that the insurance company was not an indorser for value or in the regular course of business. *Ib.*

8. No steps had been taken to collect the note of the maker. In this state a blank indorsement by a third party has a definite import, namely, that the indorser will pay the note if, on use of due diligence, it is not collected of the maker. *Ib.*

9. Our law in this respect is anomalous and often operates to make a different contract from what the parties intended, but it is too well established to be changed except by legislation. *Ib.*

10. There is no distinction as to legal effect, between an indorsement by a third person for the better security of the payee, and such an indorsement for the purpose of getting the note discounted at bank. *Ib.*

11. There was no room for an equitable estoppel against the insurance company; the plaintiffs having had full knowledge of the facts, and having parted with nothing. *Ib.*

12. Evidence held inadmissible, to show that it was the usage of banks to require all paper discounted to be commercial paper, and all persons indorsing such paper to be bound by their indorsements. Such evidence would be immaterial unless it was intended by it to substitute a contract implied by the usage of banks for that implied by law; and it would not be admissible for that purpose, as the law and not the usage of banks determined the character of that contract. *Ib.*

13. The court had power to require the plaintiffs, if they claimed from the blank indorsement anything different from the contract implied by law, to write over it the contract that they claimed. *Ib.*

14. Such a requirement is proper in such a case as a means of notifying the adverse party what contract the plaintiff claims to have been made. *Ib.*

15. Where an indorsement is made with "notice of protest waived," it is a waiver of notice of non-payment. *Continental Life Ins. Co. v. Barber*, 568.

16. Where the collectibility of a note is guaranteed it is necessary for the holder to use due diligence for its collection from the maker when it falls due. *Allen v. Rundle*, 588.

17. But if sufficient personal property of the maker can not be found, he is not bound to attach real estate. *Ib.*

18. A maker of a note, when sued by a guarantor who has paid it, can not set up in defense that the guarantor was discharged from his liability when he paid the note by reason of the laches of the holder in not collecting it out of the maker. The rule that requires due diligence on

the part of the holder is for the benefit of the guarantor and he can waive the benefit of it. *Hopson v. Etna Axle and Spring Co.*, 597.

19. Where a note is payable to the maker's own order and its payment is guaranteed, the guarantee is to be regarded as intended for any holder of the note, and, at least in equity, follows the note into the hands of every holder. *Ib.*

See also EVIDENCE, 1, 2.

NOTICE.

See KNOWLEDGE, 1, 2.

NOTICE OF EQUITY.

Where *A* was equitably entitled to a conveyance of certain premises, and was in open and adverse possession, and the legal owner in fraud of his rights made a mortgage of the premises to a party who was ignorant of *A*'s possession and of any equity on his part and who made the loan in good faith, it was held that he was not to be charged with notice of *A*'s equity by reason of his having searched only the record title and not having inquired who was in possession. *Harral v. Ler-
erty*, 46.

OFFICER (ILLEGAL FEES OF).

See FALSE IMPRISONMENT, 1, 2.

OFFICER'S RECEIPT.

Where an officer who has taken a receipt for property attached has ceased to be accountable for it to the attaching creditor, and is not accountable to the owner, he can not recover upon the receipt given for it. *Pond v. Cummins*, 372.

PARENT AND CHILD.

See INFANT.

PARTITION.

See JURISDICTION, 1.

PARTNERSHIP.

Where a person carries on business as an agent or servant of another and is to receive a certain share of the profits merely as compensation for his services, he does not thereby become in law a partner. *Pond v. Cummins*, 372.

PAUPER (STATE).

The act of 1878 (Session Laws of 1878, chap. 94, sec. 3,) provides that "all persons needing relief, who have no settlement in any town in this state, shall be state paupers, and shall, when needing relief, be provided for by the comptroller for the period of six months after they come into this state." Held that the period intended was the first six months of their pauperism, and not the first six months after their arrival in the state. *Town of Marlborough v. Town of Chatham*, 554.

PLEADING.

1. A declaration alleged that the plaintiff was owner of a tract of land (describing it,) with a stream of water running through it and a grist-mill thereon, and that the defendant, by the wrongful erection and maintenance of a dam across the stream below had obstructed the water so as "to cause it to flow back on said land and against the wheel of said mill, whereby the working of said mill was prevented and the plaintiff deprived of the use and profit of said mill." The court below found that the water was set back over a part of the land,

but not far enough to reach the wheel of the mill or affect its operation. Held that there could be no actual damages awarded for the flowing of the land, none having been alleged. *Taylor v. Keeler*, 346.

2. And that there could not be nominal damages awarded for the technical injury of overflowing the land below the mill, because the plaintiff had made his whole claim not only expressly but exclusively for damage to the mill. *Ib.*

PRACTICE.

1. The defendants at a former term of the Superior Court demurred to the plaintiff's declaration, the demurrer was overruled, the case heard in damages, and damages awarded. The judgment was reversed by this court on the defendants' motion in error, but not on any point affecting the damages, and the case was remanded to the Superior Court. In that court the defendants afterwards demurred to a replication filed by the plaintiff. Held that, on the overruling of this demurrer, the defendants were not entitled to a new hearing in damages. *New Haven Steamboat Co. v. Sargent & Co.*, 215.

2. Where evidence that should properly have been received in chief has been admitted at a later stage of the trial, the matter is wholly one of discretion, and is not a ground of error. *Bryan v. Town of Branford*, 246.

3. The act of 1882, (Session Laws, 1882, p. 145,) provides that whenever in a trial a ruling is made as to evidence objected to, a statement of the question if excluded, and of the question and answer if admitted, and of the ruling of the court, shall, if moved for, be forthwith made in writing and certified by the judge and become part of the record; and that unless such motion shall be made all objection to the ruling shall be considered as waived. Held, that the party against whom the ruling is made has a right to insist, unless in some very special case, that all proceedings shall be suspended until the written statement of the ruling has been made and certified by the judge. *Whittemore v. Smith*, 376.

See COSTS, 1, 2; JURISDICTION, 1, 2, 3; NEGLIGENCE, 1; NOTES AND BILLS, 13.

PRACTICE ACT.

1. A defendant, by a counter-claim under the Practice Act, can not bring in for adjudication any matter that is not so connected with the matter in controversy under the original complaint that its consideration by the court is necessary to a full determination of the rights of the parties as to such matter; or, if it is of a wholly independent character, is a claim upon the plaintiff by way of set-off, and not a claim against a co-defendant. *Harral v. Leverty*, 46.
2. The Practice Act did not intend to give any wider range of equitable claim on the part of the defendant or defendants than that allowed by the settled chancery practice, by means of answers and cross-bills, in suits in equity; it being intended to allow such equitable defence in actions at law as well as in suits in equity; leaving the matters of set-off and recoupment, already available in actions at law, where they stood before the act was passed. *Ib.*
3. Where therefore, in a suit for a foreclosure, in which *A* and *B* were defendants, *A* set up in his answer that he was entitled to a conveyance of the property free from incumbrance from *B*, who held the legal

title, but that *B*, in fraud of his rights, had made the mortgage in question, by reason of which he would be compelled, if the mortgage should be sustained, to pay a certain sum in redeeming the property, for which he prayed that, upon the foreclosure being granted, a judgment be rendered in his favor against *B*, it was held that he was not entitled to such a judgment. *Ib.*

4. The Practice Act provides (sec. 1,) that the complaint in a civil action shall contain a statement of the facts constituting the cause of action, and (sec. 33,) that the common counts may be used when appropriate, but that a bill of particulars shall be filed in court by the plaintiff or such further statement as may be necessary to show the cause of action as fully as is required in other cases. Under a complaint containing only the common counts for money lent, paid, and had and received, the plaintiff filed the following bill of particulars:—"1882, Feb. 6. To cash lent and money had and received, \$350." Held that under it the plaintiff could not recover for money paid under duress. *McVane v. Williams*, 548.
5. The Practice Act does not permit a defendant to bring in as co-defendants parties whose legal relation is only to himself, and whose presence or absence can not affect the judgment to be rendered as between himself and the plaintiff. *State of Connecticut v. Wright*, 581.

PRETENDED TITLE.

1. A conveyance of land of which the grantor is ousted, made to a party to whom the grantor, before the ouster, had contracted to convey it, is not within the statute against selling pretended titles. *Harral v. Leverty*, 46.
2. If the grantee was upon any ground equitably entitled to a conveyance, it would be valid although the land was held adversely by a third party. *Ib.*

See also MORTGAGE, 1.

PROBATE COURT.

See PROBATE OF WILL, 1.

PROBATE OF WILL.

F died within a probate district in this state, leaving property to be administered upon, and a will there made attested by only two witnesses. The probate court granted administration on her estate, finding in the order that she was there domiciled and died intestate. Afterward the executors named in the will had it proved in a surrogate's court in the state of New York, (by the laws of which the will was valid,) upon a citation of all parties interested. An appeal was taken from this decree to the Supreme Court of that state, in which it was found that the testatrix was domiciled in the state of New York at the time of her death and the decree of the surrogate's court was affirmed. Held—1. That this judgment was conclusive upon all persons who were parties to the proceeding, as to the question of *F*'s domicil. 2. That it was the duty of the probate court here, upon application of the executors, to admit the will to probate, for the purpose of ancillary administration. *Willets's Appeal from Probate*, 330.

PROHIBITION (WRIT OF).

See COUNTY COMMISSIONERS, 3.

RAILROAD COMPANY.

1. The matter of the fencing of their lines by railroad companies is

wholly one of statute regulation. In the absence of a statute requiring it there is no duty to maintain fences. *Campbell v. New York & New England R. R. Co.*, 128.

2. Land was taken for a railroad track at a time when a statute was in force requiring railroad companies to fence their lines except where the railroad commissioners should determine that a fence was not necessary, and in the appraisal of damages to the land-owner nothing was allowed for the expense of maintaining a fence. The statute was afterwards repealed and a new one passed requiring railroad companies to fence only where the railroad commissioners should order it. Held that there was no obligation on the part of the railroad company to maintain the fence, in the absence of an order from the railroad commissioners. *Ib.*

3. The N. H., M. & W. Railroad Company, organized under a charter which authorized it to take or purchase and hold such real estate as might be necessary or convenient for the construction and operation of the road, made in 1869, under authority of an act of the legislature, a mortgage to the treasurer of the state to secure an issue of bonds to the amount of \$3,000,000, which was recorded, as required by the act, in the office of the secretary of the state; the property mortgaged being described as "all the railroad of said company as the same is now or may be hereafter located or constructed, and all the lands that are or may be included in the location of the road or required by said company for the purposes of the railroad, with all property, real or personal, which now belongs or may hereafter belong to said company and be used as a part of the railroad or be appurtenant thereto or necessary for its construction or operation, and all the property, rights and franchises of said company under its charter." After the execution of the mortgage the president of the company purchased with the funds of the company sundry pieces of land for the track of the road, in several instances buying more than was needed with the intention of disposing of the surplus for the benefit of the company and thus obtaining the necessary lands at less cost, all the deeds being taken in such cases in his private name and that of *O*, the treasurer of the company, as joint tenants, for convenience in making conveyances. In 1870 the president and treasurer, with the approval of the company, mortgaged a portion of these lands, lying outside of the lay-out of the road, to *C*, to secure him for advances made for the road. *C* soon after made further advances upon the promise of the president that all the lands of the company except those used for the purposes of the road should be conveyed to him free from incumbrance as security. In 1872, the president of the road having died, *O*, the treasurer; under a vote of the directors, conveyed to *C* sundry other lands of the same character, which had been taken by the president and himself, intending to convey all that were so held for the company except such parts as fell within the lay-out of the road; but by mistake the draftsman omitted four parcels. In 1875, under statute regulations, the treasurer of the state foreclosed the mortgage of 1869 and conveyed the property of the railroad company to the plaintiffs, a newly organized corporation. In the foreclosure proceedings *C* was not made a party. In a suit brought against *C*, and certain parties who held under him, and against *O*, to

compel *O* to convey to the plaintiffs the lands still standing in his name, and for a foreclosure of the other defendants, it was held—1. That lands purchased by the railroad company outside of the lay-out of the road, and not needed for the construction or use of the road, were not covered by the mortgage. 2. That lands purchased after the mortgage was made, that were needed for and used by the road, passed by the mortgage, although the legal title was in the president and treasurer in their private names, they having been procured with the funds of the company and being held in trust for it, and that the mortgage of them was good against *C* and his grantees; the entire lay-out of the road being recorded under the charter in the office of the secretary of the state. 3. That the lands omitted by mistake in the deed of *O* to *C*, so far as they lay outside of the lay-out of the road and were not needed for its use, could be decreed to be conveyed by *O* to *C*. 4. That the plaintiff could not maintain a suit for a foreclosure against *C* and his grantees, so far as their interests were subject to the mortgage made by the railroad company, but that the suit could be brought only by the treasurer of the state. 5. That evidence was admissible of the representations and promises of the president of the company to *C*, under which the latter had made advances to the company relying on a conveyance of the lands as security. *Boston & N. York Air Line R. R. Co. v. Coffin*, 150.

4. The statute (Gen. Statutes, p. 232, sec. 10,) provides that any person injured in person or property by means of a defective road, may recover damages from the party bound to keep it in repair; but that "when the injury is caused by a structure legally placed upon such road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor." Held—1. That the statute applies to a case where the highway was established after the railroad was built, as well as to one where it had previously existed. 2. That the expression "it, and not the party bound to keep the road in repair," is to be read as if it was "the party otherwise bound," &c. 3. That a railroad track laid across a highway does not necessarily render it defective and unsafe, and that it was not the intention of the statute to make the railroad company liable for every injury from the track, without reference to the condition of the highway. *Allen v. N. Haven & Northampton Co.*, 215.
5. In a suit against a railroad company for an injury caused by the condition of its track at a place where it crossed a highway, the declaration alleged that the company was chartered with authority to construct and operate a steam railroad and had constructed it at the crossing in question before the injury complained of. Held to be a sufficient averment that the structure was legally placed upon the highway. *Ib.*
6. The plaintiffs, husband and wife, sixty years old, drove in a top phaeton along a street that crossed a railroad track in the city of *M*, driving a dull horse. It was the early evening, when it was growing dark, and was the regular time for a train to leave the station, which was a short distance above this crossing, and to pass over the track at this place. They had lived for thirty years in *M* and were familiar with the locality. As they approached the crossing they heard the train arriving at the station, and the wife asked the husband, who was driving, to

look out for the cars, and the engine with its headlight could easily have been seen if they had leaned forward and looked. Before they got upon the track the bell rang for the gates to be closed, and the gateman on the other side immediately began to swing his gate. The husband tried to stop the horse but was not able to do so, and the other gate, which was swung immediately after, caught in a wheel of the carriage as he was trying to drive through. The wife being alarmed jumped out and was hurt. The engineer did not start his engine until the carriage had got safely across, and if the wife had remained in the carriage she would not have been hurt. Held that the railroad company was not liable for the injury received by the wife. *Peck v. N. York, N. Haven & Hartford R. R. Co.*, 379.

7. The plaintiffs were guilty of want of ordinary care in attempting to drive across when they knew, or could have seen by looking, that a train was about to pass. *Ib.*
8. If the husband alone was guilty of actual negligence, his negligence would be imputed to the wife. *Ib.*
9. It made no difference that it was a highway, which was open to all the public. It was also the defendants' track, over which they had an equal right to pass with their trains. *Ib.*
10. It was the duty of the gatemen to close the gates immediately upon the signal being given. It was the duty of the plaintiffs to stop their horse before they got upon the track, and the gatemen had a right to presume that they would do so. *Ib.*
11. Nor was the engineer guilty of negligence. He gave the signal before the plaintiffs were on the track and did not start his train until they were out of the way. *Ib.*

RAPE.

1. The act of 1879, (Session Laws of 1879, ch. 44,) provides that "any person who shall ravish and carnally know any female of the age of ten years or more against her will and consent, or who shall carnally know and abuse any female child under the age of ten years, shall be imprisoned in the state prison, &c." Held, that in an indictment charging a rape, it is not necessary that it be alleged that the person on whom it was committed was of ten or more years of age. *State v. Gaul*, 578.
2. And that it is sufficient to allege that it was "against her will," that allegation being equivalent to "against her will and consent." *Ib.*

RECORD OF DEED.

See **TITLE BY ESTOPPEL**, 1.

SALE (CONDITIONAL.)

1. The plaintiff and defendant made a written contract by which the latter was to hire a piano of the former, of which the price was to be \$140, for twenty-seven months, for which he was to pay five dollars down and five dollars as rent at the end of each month, until the whole was paid, when the piano was to become the property of the defendant; but if default of any payment was made the plaintiff was to have the right to retake the piano and all the defendant's right to it was to cease and the money paid was to belong to the plaintiff. Held a conditional sale and not a lease. *Loomis v. Bragg*, 228.
2. The defendant's promise in the contract to pay the monthly rent was

not to be regarded as a promise for the breach of which the plaintiff could maintain a suit, but the plaintiff's remedy was solely that provided by the contract, to retake the piano; and hold as forfeited all that had been paid. *Ib.*

3. After paying several instalments the defendant made default of payment. He however for several months promised to pay the amount in arrear and the plaintiff left the piano with him, but he finally failed to make further payment and returned the piano. Held that these promises, being on no new consideration, could not be made in themselves a ground of recovery. *Ib.*

SEA-SHORE.

1. A portion of the flats lying between the upland and low water mark on the sea-shore, was conveyed by the owner of the upland by metes and bounds, leaving a portion of the flats lying outside, between the part conveyed and low water mark, the part conveyed cutting off all access to the outer part from the upland. Held that the grantee took the right to reclaim and use the outer flats with the portion of the flats definitely conveyed. *New Haven Steamboat Company v. Sargent & Co.*, 199.
2. No claim had been made for thirty years to these outer flats by the owner of the upland. Held that if the grantee were to stand on a title acquired by adverse possession of the portion conveyed, such possession would be regarded as embracing the outer portion of the flats as appurtenant. *Ib.*
3. The plaintiff and defendant were adjoining owners of reclaimed land on a harbor, with the right of wharfing out. The line of the shore was substantially east and west, and their dividing line at right angles to it, while the channel ran north-east and south-west. In wharfing out in a line with their dividing line, it would be necessary to go twenty-four hundred feet to reach the channel; while in wharfing out in a south-easterly direction and at right-angles to the channel, it would be necessary to go but fifteen hundred feet. The parties had reclaimed the flats for a short distance and in a line with their dividing line. Held that their rights were to wharf out in that line and not in the more direct one. *Ib.*

SEARCH WARRANT.

1. The statute (Gen. Statutes, p. 270, sec. 5,) provides that a complaint for a search warrant for liquors kept for sale contrary to law, and also the search warrant, shall describe the place where kept "with reasonable certainty." A complaint described the place as follows:—"Near the corner of *E.* street in the borough of *D.* in a wooden building occupied by *J. H.*, consisting of a one-story building and garden attached thereto and occupied as a place of public resort; also in another wooden building between the first mentioned and the *D. N.* office, and the cellar of said wooden building, used by said *J. H.* as a dwelling house; which said liquors are so owned and kept at said place." The search warrant described the premises in the same manner, except that it used the word *places* for *place*. Held that the place was described with reasonable certainty. *Hornig v. Bailey*, 40.
2. "The cellar of said wooden building" was to be taken to mean the cellar of the wooden building then being described. *Ib.*

3. And the allegation of the complaint that the liquors were kept "at said place" did not vitiate the warrant by its uncertainty, because it might be understood as applying to the whole premises described, and also might be stricken out as surplusage. *Ib.*
4. And held that the warrant was not void for not stating that a complaint had been made and by whom, that three residents of good moral character had made oath to the complaint, and that the justice had reason to believe that liquors had been sold in the dwelling house contrary to law, since all this appeared in the complaint and the certificate of the justice attached to it, both of which were on the same paper with the warrant and a part of the process. *Ib.*

SET-OFF.

1. A plaintiff, after suit brought, can not assign the demand to his attorney, so as to defeat a legal right of set-off which the defendant had at the time the suit was commenced. *Norwich Printing Co. v. Klop-penberg*, 295.
2. This right of set-off, originally given by Gen. Statutes, p. 434, sec. 13, is fully established by the 5th section of the Practice Act. *Ib.*

SHORE.

See **SEA-SHORE.**

SPECIFIC PERFORMANCE.

See **MORTGAGE**, 4.

STATE BOUNTY.

The acts of 1866 and 1868, (Session Laws of 1866, chap. 59, and of 1868, chap. 36,) provide for a state bounty to children of soldiers from this state who lost their lives in the late civil war, such bounty to be paid by the state treasurer to the treasurers of the several towns, and by them distributed. Held, that the town treasurers were made the agents of the state in the matter, and that they personally, and not the towns, were liable to any person for whom money had thus been received and not paid over. *Hartwell v. Town of New Milford*, 522.

STATE PROPERTY.

See **CITY ASSESSMENT**, 1, 2, 3.

STATUTES COMMENTED ON.

24th Amendment of State Constitution, (prohibiting increase of official compensation). *Wright v. City of Hartford*, 546.

Revision of 1821, p. 200, sec. 6, (revocation of wills). *Peck's Appeal from Probate*, 562.

General Statutes, p. 44, sec. 29, (admission of attorneys). *In re Hall*, 131. Id., p. 164, sec. 21, (tax-warrants). *Wilcox v. Gladwin*, 77.

Id., p. 282, sec. 10, (injury from defective highway). *Allen v. N. Haven & Northampton Co.*, 215; *Tuttle v. Town of Winchester*, 498.

Id., p. 289, sec. 47, (bond on highway hearing). *Bryan v. Town of Bradford*, 247.

Id., p. 270, sec. 5, (search-warrant for liquors). *Hornig v. Bailey*, 40.

Id., p. 345, sec. 1, (fraudulent conveyances). *Allen v. Rundle*, 10.

Id., p. 354, sec. 15, (ousted of possession). *Harral v. Leverty*, 55.

Id., p. 355, sec. 22, (release of mortgage by executor, &c.) *Treadwell v. Brooks*, 262.

Id., p. 369, sec. 2, (execution of wills). *Willets's Appeal from Probate*, 339.

Id., p. 379, sec. 5, (insolvent act). *Hawes's Appeal from Probate*, 317.
Id., p. 434, sec. 13, (set-off). *Norwich Printing Co. v. Kloppenberg*, 295.
Id., p. 442, sec. 2, (charge of court in writing). *Allen v. Rundle*, 10.
Id., p. 447, sec. 1, (petition for new trial). *Brown v. Congdon*, 302.
Id., p. 498, sec. 1, (murder). *Smith v. State*, 193.
Id., p. 520, sec. 43, (intoxicating liquors). *State v. Moriarty*, 415.
Id., p. 522, sec. 60, (keeping liquor saloon open on Sunday). *State v. Ryan*, 411.
Id., p. 545, sec. 3, (abetting crime). *State v. Teahan*, 101.
Session Laws of 1866, ch. 59, }
" " 1868, ch. 36, } (state bounty.) *Hartwell v. Town of New Milford*, 522.
Session Laws of 1875, ch. 95, (bond on highway hearing). *Bryan v. Town of Branford*, 247.
Session Laws of 1877, ch. 47, (taxation). *Batterson v. Town of Hartford*, 558.
Session Laws of 1877, ch. 120, (bond given by county commissioners).
State v. Wright, 580.
Session Laws of 1878, ch. 94, (state paupers). *Town of Marlborough v. Town of Chatham*, 554.
Session Laws of 1878, ch. 129, (appraisal of foreclosed property). *Sisson v. Tubbs*, 292.
Session Laws of 1879, ch. 44, (rape). *State v. Gaul*, 578.
Session Laws of 1881, ch. 124, (county commissioners). *La Croix v. County Commissioners*, 321.
Session Laws of 1882, ch. 50, (ruling excepted to). *Whittemore v. Smith*, 376.

STATUTE OF FRAUDS.

See **EQUITABLE ASSIGNMENT OF STOCK**, 3, 4.

STATUTE OF LIMITATIONS.

SEE **BUILDERS' LIEN**, 1.

STOCK DIVIDEND AND NEW STOCK.

1. A testator dying in 1866 left \$100,000 to trustees to be invested and held for his four children equally during their lives, the "rents, dividends, increase and income thereof" to be paid to them annually. The testator owned at his death a large number of shares of a fire insurance company, which went to the trustees as a part of the trust fund at a valuation of \$194 per share. The assets of the company then largely exceeded its liabilities. In 1881 the capital of the company was \$3,000,000, and its accumulated profits \$3,000,000; and the market value of its stock was \$282 per share. During that year it increased its capital from three to four millions, apportioning the new shares *pro rata* among the stockholders at \$100 per share, the trustees becoming entitled to subscribe for eighty-one shares. The new stock was at once at a large premium and the trustees sold the right to subscribe for thirty-four shares for a sum which enabled them to subscribe and pay for forty-seven shares. After the new stock was issued the dividends on the whole stock were considerably smaller. Held that the right to subscribe for the new shares, the profit on a sale of the right, and the new shares taken, went to the trustees as a part of the principal of the fund and not to the children as a part of the income. *Brinley v. Grou*, 66.

2. And held that the term "increase," in the provision of the will that the "rents, dividends, increase and income" of the fund should be paid to the children annually, was not to be construed, so far as it applied to this part of the fund, as meaning anything more than dividends. *Ib.*
3. And that it was not enough to vary this construction that the insurance company had in the testator's lifetime on three occasions increased its capital, and that he might have foreseen that it would do so again. *Ib.*

STOCK (EQUITABLE ASSIGNMENT OF)

See **EQUITABLE ASSIGNMENT OF STOCK.**

SUNDAY.

See **INTOXICATING LIQUORS, 1, 14.**

SURETY.

1. To discharge a surety by giving time to the principal, the creditor must have put it out of his power for the time to proceed against the principal. *Continental Life Ins. Co. v. Barber*, 567.
2. A note of \$8,000, which was indorsed by *B* for the accommodation of the maker, with waiver of notice, fell due and was not paid. The maker soon after paid \$4,000, and gave his note on demand for \$4,000, payable to the order of the holder of the original note, with interest payable semi-annually, and secured it by a mortgage, the indorser having no knowledge of the transaction. This note and mortgage the holder accepted as additional security for the balance of the original note. Held not to discharge the indorser. *Ib.*
3. The facts that the collateral note was secured by a mortgage, and that it was on interest payable semi-annually, did not affect the case. There still existed the right to sue at any time on the original note. *Ib.*

TAXATION.

1. The act of 1877 (Session Laws, ch. 47,) provides that shares of the stock of insurance and various other corporations, owned by a resident of this state, shall be set in his tax list at their market value; but that if any portion of the capital is invested in real estate on which the company is assessed and pays a tax, the assessed value of such real estate shall be deducted from the market value of the stock. Held, that the assessed value of real estate owned by the company outside of this state, on which it paid a tax in the state where situated, was to be deducted as well as that of real estate in this state. *Batterson v. Town of Hartford*, 558.
2. And held that no deduction was to be made for United States non-taxable bonds held by the company. *Ib.*
3. The sum to be deducted, upon each share of the stock, in the tax list of a shareholder, should bear the same proportion to the market value that the entire investment in taxable real estate bears to the entire surplus of assets above liabilities. *Ib.*

TAX WARRANT.

1. The statute with regard to tax warrants (Gen. Statutes, p. 165,) provides that they "may be in the following form." The form then given, after directing the officer to demand the several taxes of the several persons named in the tax list, proceeds as follows:—"And if any person fails to pay his proportion of said tax you are to levy upon his

goods and chattels, * * and for want of such goods and chattels you are to levy on his real estate * * or take the body of said person and commit him unto the keeper of the jail," &c. Held, in trespass against an officer for levying a tax warrant on the body of the plaintiff and committing him to prison—1. That it was not necessary that the form given should have been followed, the statute not being imperative. 2. That the omission in the warrant of the alternative direction to levy on real estate did not make the warrant void, inasmuch as, with that provision in it, the officer would have had full power to levy on the body as he did, and it was a matter as to which the plaintiff had no election. *Wilcox v. Gladwin*, 77.

2. The officer endorsed his fees for the service of the warrant upon the original warrant which he returned to the justice, but did not endorse his fees on the copy which he left with the jailer. Held that the latter endorsement was not necessary. *Ib.*

TENANT IN COMMON.

1. Where a tenant in common has made necessary repairs upon the property, he can recover of his co-tenants their share of the expense. *Fowler v. Fowler*, 258.
2. Previous to the adoption of the Practice Act assumpsit would have lain in such a case, and a recovery can now be had in an ordinary civil action under that act. *Ib.*

TITLE BY ESTOPPEL.

1. Whether a deed with covenants of title given before the grantor acquires title to the land conveyed, and placed on record, is to prevail over a deed given after the title is acquired to a purchaser who takes in good faith, for value, and with no notice of the previous deed: *Quare. Salisbury Savings Society v. Cutting*, 113.
2. If as a general rule the later deed is to prevail, yet it can not where it is a mortgage given for a pre-existing debt. *Ib.*
3. Nor where the circumstances are such as reasonably to put the second grantee upon inquiry as to the existence of the prior deed. *Ib.*

TRADE MARK.

1. A contract was entered into by the vendor and vendee of certain trade-marks, by which the vendor was to receive \$500 per month, payable monthly in advance, for ten years, with the following provision:—"The payment of said sum shall at all times be dependent upon the vendee being fully secured in the exclusive use of said trade-marks, and if any other party shall establish his right to use either of them said payments shall thereupon cease." The vendee was undisturbed in the exclusive use of the marks and made the monthly payments for five years, when the debt was attached by a creditor of the vendor. Held that the securing of the vendee in the exclusive use of the marks was not a condition precedent of the obligation to make the monthly payments, but that a present indebtedness was created for the whole amount which could be taken by foreign attachment. *Goodman v. Meriden Britannia Co.*, 139.
2. The obligation of the vendee to continue to make the monthly payments would of course cease if at any time any other party should establish his right to use the marks. *Ib.*
3. The plaintiffs were partners under the name of "D. F. Tayler & VOL. L.—42

Co.," and for several years had manufactured and sold hair-pins, which were well known and had a ready sale as "Taylor's Hair-pins," and "D. F. Tayler & Co.'s Hair-pins," the device on the packages, which were put up in pink and yellow wrappers, being used exclusively by them and being well known to the trade. The defendants were also engaged in the manufacture and sale of hair-pins and had procured from one L. B. Taylor the right to mark their packages "L. B. Taylor & Co.," to which was added the words "Cheshire, Conn." In a suit for an injunction against the use of their device it was found that "the size and color of the labels and wrappers and the device printed thereon used by them resembled the plaintiffs' labels, wrappers and devices thereon, to such a degree that they were liable to deceive careless and unwary purchasers who buy such goods with but little examination, but that purchasers who read the entire trade-mark and label could not be deceived. It was further found that the defendants adopted the label and device in good faith and in the belief that they were not infringing the plaintiffs' rights." Held that an injunction should be granted. *Williams v. Brooks*, 278.

4. And that the injunction should be "against such a use by the defendants of the name of "L. B. Taylor & Co.," in connection with any device upon pink or yellow wrappers inclosing hair-pins of their manufacture, as that the combination would be liable to lead purchasers to believe that hair-pins manufactured by them were manufactured by the plaintiffs. *Ib.*
5. The defendants were not excused for the use of the label and device by the fact that they acted in good faith and believed that they were not infringing the rights of the plaintiffs. The injury to the plaintiffs remained the same. *Ib.*
6. The purpose to be effected by an injunction in such a case is not primarily to protect the purchaser, but to secure to the manufacturer the profit to be derived from the sale of his goods to all who may desire and intend to purchase them. *Ib.*
7. And held that, for the purpose of proving that the defendants' packages with their labels so closely resembled those of the plaintiffs as to mislead an ordinary purchaser, wholesale dealers in hair-pins might testify as experts. *Ib.*

VENDOR'S LIEN.

1. Whether a vendor's lien, supposing it to be recognized by our law, can be enforced in favor of an assignee of the vendor's claim: *Quere. Hall v. Hall*, 104.
2. Whether a vendor's lien exists in this state, discussed in the argument, but not decided. *Ib.*

VERDICT.

The practice of jurors marking severally a sum for the damages in a case, and dividing the aggregate amount by twelve, and taking the result for the amount of the damages in their verdict, is a reprehensible one. *Haight v. Hoyt*, 584.

VERDICT FOR EXCESSIVE DAMAGES.

See DAMAGES (EXCESSIVE).

WHARFAGE.

See SEA SHORE, 1, 2, 3.

WILL.

1. A testator, leaving a large real and personal estate, made the following bequest:—"I give one fifth to my daughter *S*, the interest to be paid over to her semi-annually during her life; and in case of her death I give the same in fee simple to her children, if she leave any, but if none then to my other children or their issue in equal shares, the children or grandchildren to take the share which the deceased parent would take." *S* survived the testator and afterwards died leaving no issue. After the death of the testator and before that of *S*, *C*, a son of the testator, went into bankruptcy and the settlement of his bankrupt estate was not yet closed. Held—1. That the contingent gift to the other children on the death of *S* without issue was good only as an executory devise. 2. That the interest of *C* vested only on the death of *S*. 3. That no interest passed to *C*'s assignees in bankruptcy. *Bristol v. Atwater*, 402.
2. The persons to take the contingent interest on the death of *S* without issue being the "other children of the testator or their issue," were not ascertainable until the death of *S*, and therefore the interest could not vest in them. *Ib.*
3. A testator made the following bequest to his wife:—"I give to my wife *G* all the income of my estate, and so much of the principal as may be necessary for her support and the maintenance and education of my five daughters, during her natural life." The testator died two years later. A part of the property bequeathed was real estate of the value of \$3,400. Eight years later the plaintiffs obtained a judgment against *C*, the widow, for \$418, and recorded a judgment lien upon the real estate, and now sought to foreclose the lien. At this time the personal property had been exhausted and nothing remained but the real estate, which yielded an income of but \$200. Two of the daughters were dead, one was married, and two with the widow were dependent on the property for support. Held—1. That the widow took a life estate only in the land. 2. That she took this estate in trust. 3. That her interest, being inseparable from that of the daughters, and all the property being needed for her and their support, could not be taken upon a judgment against her. *Tolland Co. Ins. Co. v. Underwood*, 493.
4. A testator gave certain property to a trustee, for the use of his widow during her life, and after her death "the income to be devoted to the education of the freedmen, and paid over annually to the proper officers of the Freedmen's Association for that purpose by the trustee." The term "freedmen" was one generally applied to the lately emancipated slaves and their descendants. There were, numerous organizations which had for their object the education of these people, but no one which bore the name of Freedmen's Association. Held—1. That evidence that the testator told the scrivener who drew the will that he wanted to give the income of the property in trust for the education of the freedmen, and that there was a freedmen's association organized by the Methodist church people in Cincinnati, and that he wanted it payable to the officers of that association, was inadmissible. 2. That the trustee could not appropriate the income for the education of the freedmen as a class. *Fairfield v. Lawson*, 501.
5. The power given the trustee was merely to pay the income to the

proper officers of the Freedmen's Association. The court could not prescribe an additional duty without making an addition to the will. *Ib.*

6. Besides, the freedmen were several millions in number, and no power was given to the trustee, or to any one, to select the individuals who should receive the benefit. Every individual would therefore have a right to share in the bounty, and it would be impossible to administer the trust. *Ib.*

7. If a charity does not fix itself on a particular object, but is general and indefinite, and no plan is prescribed and no discretion given in the will for the selection of the beneficiaries, it does not admit of judicial administration. *Ib.*

8. Under the rule which admits parol evidence in cases of ambiguity, to aid in the construction of a will, it is necessary that the words of the will should describe accurately the subject or object of the gift, and that the parol evidence should go only to show which of certain properly described subjects or objects was intended. *Ib.*

9. Another item in the same will was as follows: "I give to my executor all my real estate, to be sold, and the proceeds held in trust for the education of the freedmen, and the income to be paid by him to the proper officers of the Freedmen's Association, or disposed of as he pleases." Held—1. That the trust adhered to the proceeds in the hands of the executor, even though the trust failed as to the Freedmen's Association. 2. That it became then a gift upon trust, with no provision as to who should take the benefit of it, and therefore could not be carried out. 3. That the fund became intestate estate, and that the testator took nothing personally. *Ib.*

10. The revocation of a former will by the mere execution of a later one, is ambulatory, and does not take effect till the second will becomes operative by the death of the testator. *Peck's Appeal from Probate*, 582.

11. And the revocation of the second will will revive the former. *Ib.*

12. How it would be where the second will in express terms revokes the former: *Quare*. The weight of authority is in favor of the doctrine that the revoking clause does not take effect till the will becomes operative by the death of the testator. *Ib.*

13. The *question* is materially affected by the statute of 1821 with regard to the revocation of wills, which was passed since the decision of this court in *James v. Marvin*, 3 Conn., 576. *Ib.*

14. That *statute* has been somewhat changed in its phraseology, in the later revisions, but without essentially changing its meaning. *Ib.*

15. A testator, leaving a large estate and no children, gave to a sister all the income of the property during her life, and after her death an annuity of \$1,400 a year with the use of his dwelling house to a niece, and after some further small bequests the residue of his estate for the establishment of a school. By a codicil made later on the same day that the will was made, he gave to *S* for her life \$350 a year. Held, that this annuity began to run from the death of the testator, and not from the death of the sister to whom he had given the whole income for life. *Simmons v. Hubbard*, 574.

16. Held also, that the deferred payments would draw interest. *Ib.*

17. And held that, in a suit brought by *S* against the trustees, in which the plaintiff asked for a judgment giving a construction to the will, and for a recovery of the amount due to her under it, the expenses of the litigation were not to be taken out of the estate, but only ordinary costs taxed. *Ib.*

WILL, PROBATE OF.

See **PROBATE OF WILL.**

WOMEN ADMITTED AS ATTORNEYS.

See **ATTORNEYS AT LAW, 1.**

WRIT OF PROHIBITION.

See **COUNTY COMMISSIONERS, 3.**

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P. 33, second line—for *her* read *his*.
 “ 90, eighth line from bottom—for *thirteen* read *twelve*.
 “ 165, second line—for *requiring* read *re-acquiring*.
 “ 245, second line from bottom, and eighth line on next page—for *eleven*
 read *one*.
 “ 381, thirteenth line—for *forty-two* read *seventy-six*.
 “ 430, sixteenth line—for 1879 read 1881.
 “ 439, sixteenth line from bottom—for 1 Geo. 1, read 4 Geo. 1.
 “ 463, fourth line from bottom—for *his* read *the defendant's*.
 “ 466, sixteenth line from bottom—for 411 read 41.
 “ 468, second line—for *seventeen* read *sixteen*.

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